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# Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide

*Ryan Elias Newby\**

## I. INTRODUCTION

Karen Provencio is serving fifty years to life in prison for killing her husband in their Temecula home in December of 1998.<sup>1</sup> She insisted his death was an accident, caused by a gun going off in her hand when she removed it from their bed for safekeeping.<sup>2</sup> She and her husband fought the night he died, and their children reported he was crying afterwards, before they went to bed.<sup>3</sup> That night, she shot him in the head while he was sleeping.<sup>4</sup> While she told friends shortly before the killing that he was mean to her, Provencio said she could not leave because she did not want to share custody of their children.<sup>5</sup> Several times over the two years preceding the murder, Provencio told her neighbor that she wanted him

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\* Ryan Newby, Executive Articles Editor, *Hastings Women's Law Journal*, 2010–2011, J.D. Candidate, University of California, Hastings College of the Law, 2011; B.A., Smith College, 2005. This Note is dedicated to my grandmothers, Marilyn E. Newby and Sarah J. Allan. For her help in the research and methodology design in this project, as well as her unflagging support, encouragement, and mentorship, I owe a debt of gratitude to Professor Hadar Aviram. Any errors result from my implementation and not her advice. I also thank Professor Aaron Rapaport, who gave me detailed and invaluable input on an early report on this data in the Criminal Concentration Seminar. Thanks also to the Journal staff who edited my work with care and dedication; this Note would not have been possible without their considerable efforts.

My sister Diana helped me with my initial research, my father discussed the many versions of my argument at length, my mother and aunt read and critiqued several drafts, and my mother, step-father, and extended family tolerated my spending an entire holiday visit working on this paper and encouraged me to keep at it. Finally, my husband, Coren Rau, has read every draft of every paper I've written in law school; he has talked through every proposition posed in this paper and those that did not survive from earlier drafts; he has cooked for Journal meetings, tolerated my late nights, and even watched the World Series at the *Women's Law Journal* office with me while I edited this Note.

1. Joe Vargo, *Woman Denies Killing*, JUNE 22, 2000, PRESS-ENTERPRISE, <http://www.press-enterprise.com/newsarchive/2000/06/22/961652036.html>; *People v. Provencio*, No. E027642, 2002 WL 31045485, at \*1 (Cal. Ct. App. Sept. 13, 2002).

2. Vargo, *supra*, note 1.

3. *Provencio*, 2002 WL 31045485 at \*1.

4. *Id.*

5. *Id.* at \*2.

dead, and once stated that she had found someone to do it.<sup>6</sup> She asked two different lovers over the course of two years to kill her husband, and told one of them that her sister had agreed to do it, but had "chickened out."<sup>7</sup> She was sentenced an additional twenty-five years to life for the use of the gun, on top of the twenty-five to life sentence for first-degree murder.<sup>8</sup>

James Linkenauger killed his wife, JoAnn, in January 1993.<sup>9</sup> He assaulted her several times during their two-year marriage.<sup>10</sup> On the night of her death, neighbors heard screaming coming from the Linkenauger's home, and one neighbor saw Linkenauger "dragging a woman by the hair toward the garage."<sup>11</sup> JoAnn's beaten and strangled body was found in a ravine the next day.<sup>12</sup> She was dressed in a nightgown and jeans, which were pulled down around her knees.<sup>13</sup> She had been strangled with such force that her voice box was fractured. She had been beaten on the head, face, and arms, causing her to lose two pints of blood.<sup>14</sup> It appeared that some of these injuries were caused by being hit with a fist "or slammed against a wall or floor."<sup>15</sup> The medical examiner testified that the strangulation would have taken five to ten minutes, during which time she would have been "acutely aware of the pain."<sup>16</sup> The force of the strangulation caused her to defecate, and blood was found in the carpet and on the walls of the Linkenauger residence, as well as in the trunk of her car.<sup>17</sup> Linkenauger maintained his innocence but was convicted of first-degree murder at trial and sentenced to twenty-five years to life.

The difference between the sentences in these two cases is that Provencio received an enhancement for the use of a weapon and Linkenauger did not. Sentence enhancements are supposed to deter criminals from using guns while they commit felonies.<sup>18</sup> Whether this approach is effective in deterring crimes such as robberies, it seems a poor fit for domestic crimes, where the set of motivations leading to violence may be different than those in street crime.<sup>19</sup> When women use weapons

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6. *People v. Pace-White*, No. E028157, 2002 WL 661557, at \*1 (Cal. Ct. App. Apr. 23, 2002).

7. *Id.* at \*2.

8. *Id.*

9. *People v. Linkenauger*, 32 Cal. App. 4th 1603, 1606 (1995).

10. *Id.*

11. *Id.* at 1607.

12. *Id.* at 1606.

13. *Id.*

14. *Id.*

15. *Id.* at 1607.

16. *Id.* at 1606.

17. *Id.* at 1606-07.

18. See James M. LaValle, *Guns and Homicide: Is the Instrument-Focused Approach to Deterrence Efficacious?*, 5 JUST. POL'Y J., no. 2, 2008 at 24, [http://www.cjcj.org/justice\\_policy\\_journal](http://www.cjcj.org/justice_policy_journal).

19. LaValle argues that such statutes may deter gun use during homicides, but do not deter homicides. *Id.*

such as guns and knives in both defensive and aggressive interpersonal violence, they are disproportionately affected by weapons enhancements statutes, such as those in place in California.<sup>20</sup>

The purpose of this Note is to address two specific questions in this broad area of social and legal problems. First, to what extent do women and men commit crime differently, and what affect do those differences have on the sentences they receive at trial? Second, what role do gendered expectations for women's and men's behaviors play in their experiences as defendants in spousal homicide cases? This Note addresses these questions through an examination of seventy-three domestic homicide appeals in California.

This Note demonstrates that to the extent that women and men commit domestic homicide in different ways and for different reasons, their outcomes at trial are different. In particular, this Note shows that women are more likely to receive weapons enhancements because they are less able to commit homicide using personal weapons (fists, hands, and feet) compared to men. On the other hand, women who are able to show prior aggression by their male partners may receive lesser sentences even when they are unable to prove perfect self-defense. This Note does not explain all differences or similarities between men's and women's cases, but is limited to specific areas of inquiry. The purpose of this Note is to suggest areas of further inquiry appropriate for studies with larger sample sizes.

Section II outlines two popular theories addressing disparate treatment of men and women in the criminal justice system: specifically, chivalry and paternalism theories, as well as the "evil woman" theory, which examine why some women may be given lenient treatment while others are sentenced harshly. Section III discusses ways in which women's and men's crimes differ according to type, degree of violence, and overall frequency, and the ways in which men and women offend differently in the area of intimate partner violence. Section IV begins with the history of Battered Woman Syndrome and its use in criminal law. The Section will then discuss the role of the jury and the significance of extralegal prototypes—juror conceptions of crime—in framing juror's decisions. The Section ends with a discussion of homicide in the context of California's determinate sentencing scheme.

Section V describes the findings from a quantitative and qualitative analysis of women's and men's appeals from convictions of spousal homicide in California. The Section begins by detailing the methodology for study design and data collection. This is followed by Subsections describing the findings of first the quantitative and then the qualitative

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20. See, e.g., CAL. PENAL CODE § 12022 (West 2010) (establishing a range of weapons enhancements for use of firearms and other "dangerous or deadly" weapons in the commission of a felony).

analyses. The quantitative section investigates the correlations between gender and degree of offense, weapon choice, and enhancements. The qualitative section looks more closely at some of the women's cases by grouping them according to the gendered implications of their crimes and assessing the relationship between defendant and victim behaviors and the degree of offense of conviction. Specifically, this analysis shows that the extent to which a woman's behavior fits into traditional positive and negative conceptions of female behavior seems to have a relationship to the seriousness of the offense for which she is found guilty. Section VI will discuss the results of this examination and suggest future research in this same vein.

## II. DISPARATE TREATMENT OF MEN AND WOMEN

The differing experiences of female and male defendants have been widely noted. Justice Thurgood Marshall famously observed with disapproval the much higher rate at which men are sentenced to die than women: "It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes."<sup>21</sup> Today, that disparity between the sexes continues. As of March 2, 2010, there were 684 men on California's death row and only 17 women.<sup>22</sup> Capital cases are an extreme example in any discussion of crime. Outside of the capital context, there are also differences in the number of women and men serving prison sentences. In California, women comprise less than 7% of all prisoners.<sup>23</sup> This figure is not unique to California—women comprise only 7% of all state and federal inmates nationwide.<sup>24</sup>

The disparity between women's and men's treatment under the law may also be observed in the area of domestic violence arrests and convictions. In one nationwide study of intimate violence cases in urban counties, men were much more frequently the defendants in criminal prosecutions for violence against their female partners than women were for violence against their male partners—84% of cases involved a female victim and male defendant.<sup>25</sup> Further, convictions were more likely in

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21. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Justice Marshall concurring).

22. CAL. DEP'T OF CORR. AND REHAB., CONDEMNED INMATE SUMMARY LIST 1 (2010).

23. CAL. DEP'T OF CORR. AND REHAB., PRISON CENSUS DATA AS OF JUNE 30, 2009 tbl.2 (2009) [hereinafter PRISON CENSUS DATA] (showing 11,033 women and 156,948 men in prison for California convictions).

24. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 2 tbl.2 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763>.

25. ERICA L. SMITH & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF INTIMATE PARTNER VIOLENCE CASES IN LARGE URBAN COUNTIES 1 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2024> (finding that, in a survey of intimate partner violence cases filed in sixteen large urban U.S.

cases with male defendants and female victims than any other combination.<sup>26</sup> When women were convicted of intimate partner violence against male victims they were less likely to be incarcerated than were male offenders with female victims, or offenders of either sex with a victim of the same sex.<sup>27</sup> Finally, women were twice as likely as men to use a weapon such as a knife, gun, or blunt instrument, which may arise from the statistically typical size difference between opposite sex partners.<sup>28</sup>

Studies have also found differences between the sentences of men and women who commit spousal homicide. As with other violent offenses,<sup>29</sup> fewer women are convicted of spousal homicide than are men.<sup>30</sup> There has been much debate over the meaning of this difference and the different sentences imposed. Some have argued that women who kill or otherwise harm their husbands receive undue leniency due to illegitimate use of what Alan Dershowitz has called the “abuse excuse.”<sup>31</sup> Dershowitz criticizes the use of past harm to show the reasonableness of deadly violence.<sup>32</sup> He and

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counties in May of 2002, 84% of the time, defendants were male and victims were female and in only 12% of cases were the defendants female and the victims male; a small percentage of these cases were same-sex couples). Smith and Farole also found that in the cases observed, nearly 60% of male defendants accused of harming female victims were convicted, whereas only 40% of female defendants with male accusers were convicted. *Id.* Further, 85.5% of women with male accusers were arrested on misdemeanor charges and 14.5% on felony charges. *Id.* For men with female accusers, those figures were 80.9% and 19.1%, respectively. *Id.*

26. SMITH & FAROLE, *supra* note 25, at 1.

27. *Id.* at 8 (showing that 5% of women convicted for committing a violent act against a male victim were sent to prison and 65.8% were sent to jail; 7.5% of men convicted of committing a violent act against a female victim were sent to prison and 76.2% were sent to jail).

28. *Id.* at 3.

29. *See, e.g.*, PRISON CENSUS DATA, *supra* note 23 at tbl.3 (showing that approximately one third (33.9%) of women in California institutions committed personal crimes, whereas over half of incarcerated men committed crimes against persons (56.1%)).

30. PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES iii (1995). Langan and Dawson examined homicide cases including married, common-law, and separated couples but not divorced couples. *Id.* at 2. Of the 222 women charged with killing their husbands, 70% were convicted, whereas 87% of the 318 husbands charged were convicted. *Id.* at iii. While many women and men plead guilty, 31% of women who went to trial were acquitted, compared to only 6% of men. *Id.* While women were acquitted by both judges and juries, none of the men in the sample were acquitted by a jury. *Id.*

31. CORAMAE RICHEY MANN, WHEN WOMEN KILL 126 (1996) (based on studies of observers, arguing that women are treated less punitively than men who have committed the same offenses); *see also generally* ALAN DERSHOWITZ, THE ABUSE EXCUSE (1994) (arguing that Battered Woman Syndrome and other “abuse excuses” are overused in criminal litigation and reflect an inappropriately lax attitude toward accountability in contemporary United States law and society).

32. DERSHOWITZ, *supra* note 31, at 6. “A history of abuse is not a psychological or a legal license to kill. It may, in some instances, be relevant at sentencing, but certainly not always.” *Id.* “Another serious problem with the abuse excuse—and other excuses that are gender- or race-specific—is that it sends a dangerous double message of irresponsibility, especially about women.” *Id.* at 30.

others, like James Q. Wilson, have argued that the acceptance of Battered Woman Syndrome evidence shows a decline in the importance of personal responsibility in American society.<sup>33</sup> Whether this particular contention is accurate, some studies of intimate partner homicide have indeed shown women and men being arrested for first-degree murder at similar rates, but convicted at different rates.<sup>34</sup>

The small number of women defendants in the domestic violence and homicide cases discussed *supra*, combined with the differential treatment of male and female defendants generally, lends support to the argument that women are treated with leniency in the criminal justice system.<sup>35</sup> The most common explanations feminist criminologists give for such differences in punishment between men and women are the chivalry theory and the paternalism theory.<sup>36</sup> Chivalry theory posits that men are unwilling to harm women or to believe that a woman could be capable of criminality.<sup>37</sup> The paternalism theory states that women are seen as childlike and in need of protection and guidance, and therefore cannot be held fully responsible for their wrongful acts.<sup>38</sup> Both theories "assume that judges have a benevolent or condescending attitude towards women and believe women defendants are in need of guidance and protection from the harshness and stigma associated with prison sentences."<sup>39</sup> Many studies support that "wherever discretionary decisions are made, women are less likely than men to be detected, arrested, charged, convicted, and

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33. See Alan Dershowitz, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, 3 BUFF. CRIM. L. REV. 775, 779 (2000) (reviewing JAMES Q. WILSON, *MORAL JUDGMENT* (1998)).

34. See LANGAN & DAWSON, *supra* note 30, at 3 tbls. 5, 15. 71% of women and 69% of men charged with spousal homicide in the study counties during 1988 were arrested for first-degree murder. *Id.* at 3 tbl.15. Of those who went to trial (rather than pleading guilty or having the charges dropped) 70% of wives and 68% of husbands had been arrested for first-degree murder. *Id.* at 6 tbl.11. Of those convicted at trial, 37% of husbands and 32% of wives were convicted of first-degree murder; 10% of husbands and 6% of wives were found guilty of negligent manslaughter (called involuntary manslaughter in California). *Id.* at 6 tbl.12. For second-degree murder and nonnegligent manslaughter (voluntary manslaughter), women were convicted at a slightly higher rate than men: 33% versus 30% for second-degree murder and 29% versus 22% for voluntary manslaughter. *Id.*

35. Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 LAW & SOC'Y REV. 45, 45 (2008).

36. R. Keith Crew, *Sex Differences in Criminal Sentencing: Chivalry or Patriarchy?* 8 JUST. Q. 59, 60 (1991); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 508 (1990) [hereinafter Rapaport, *Questions*].

37. Crew, *supra* note 36, at 60.

38. *Id.*; see also FRANCES HEIDENSOHN, *WOMEN AND CRIME* 45-46 (2d ed. 1995) (citing a study in which Scottish sheriffs reported that women who were law breakers were "more mad than bad" and were "bad mothers," who would benefit from time in the women's prison, which they described as being comfortable and safe and full of "kindly paternal discipline").

39. See Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 269 (1996).

sentenced,”<sup>40</sup> and that when women are sentenced, they receive “milder sentences than men.”<sup>41</sup> Further, there are indications that women are less likely than men to actually be executed once they are sentenced to death.<sup>42</sup>

Some researchers have posited that factors such as gender-based family roles,<sup>43</sup> sexual orientation,<sup>44</sup> and race<sup>45</sup> may affect sentencing differences between men and women. These findings suggest that not all women enjoy equal access to the benefits of chivalrous or paternalistic benevolence. Indeed, many argue that the extent to which women adhere to gendered expectations directly affects the degree of leniency or harshness they experience.

Some data indicate that, at least in certain circumstances, women who are convicted of spousal homicide may be subjected to relatively harsher treatment than their male counterparts. A popular theory for explaining why some women receive harsh treatment when others do not is the “evil woman” theory.<sup>46</sup> The “evil woman” theory has been used to explain why, in a system that often seems reluctant to sentence women harshly, some women still receive very harsh sentences.<sup>47</sup> Within the framework of this theory, “evil” women are those who commit “shockingly ‘unladylike’ behavior, [which] allow[s] the sentencing judges and juries to put aside any image of them as ‘the gentler sex.’”<sup>48</sup> The defendant is dehumanized, allowing the jury to condemn her to die, and vindicating the death penalty’s role as “social cleansing tool.”<sup>49</sup> “[E]xecuting these socially deviant women provides a way for society to set the outer limits which define

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40. Herzog & Oreg, *supra* note 35 at 47.

41. *Id.*

42. Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N. U. L. REV. 581, 584 (2000) [hereinafter Rapaport, *Equality of the Damned*].

43. Gayle S. Bickle & Ruth D. Peterson, *The Impact of Gender-Based Family Roles on Criminal Sentencing*, 38 SOC. PROBS. 372 (1991) (reinforcing studies showing that marriage and motherhood affect sentencing differentials between men and women—interestingly, the relevant factors correlating with leniency also vary by race). In this study of forgery cases, marriage was correlated with harsher sentences for both Black and white men, as well as white women, whereas it was correlated with more lenient sentences for Black women. *Id.*

44. See Kathryn Ann Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, 11 WOMEN & CRIM. JUST. 49 (2000) (finding that lesbians are overrepresented in capital cases and that prosecutors depict these women as “manly and man-hating” as a strategy for gaining conviction and death sentences).

45. See Sharon Angela Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 196–97 (1991) (asserting that Black and poor women are less able to successfully employ Battered Woman Syndrome arguments in front of juries who are likely to see them as aggressive and angry, and therefore disbelieve their claims of timidity and fear).

46. Rapaport, *Questions*, *supra* note 36, at 512–13.

47. *Id.*

48. Melinda E. O’Neill, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 221 (1999).

49. *Id.*



gender roles.”<sup>50</sup> Thus, when women behave in a “manly” way by committing acts of violence, they forfeit the advantage conferred by femininity.

If the chivalry and paternalism theories are accurate, one would expect the examination of California cases to demonstrate that the sample women were convicted of lower degrees of murder than the sample men. The “evil woman” theory would lead us to expect women who kill in ways that are especially egregious *for women* to be convicted of a more serious offense and given a longer sentence than women who behave in more acceptably feminine ways. Thus, coldness or indifference, extreme violence, or acting for personal or financial gain would likely result in more harsh treatment than would a woman who could show bad behavior on the part of her partner, and attempts to find other resolutions to relationship conflicts.

### III. THE DIFFERENCE BETWEEN MEN'S AND WOMEN'S CRIMES

One of the advantages long assumed to be accessible to men who kill their wives is the heat of passion defense, which allows a man who has killed his wife to claim that her infidelity caused him to become enraged and kill her.<sup>51</sup> A successful heat of passion defense would result in a conviction for voluntary manslaughter rather than murder.<sup>52</sup> In contrast, at common law a woman who killed her husband was tried not for mere murder, but for *petit treason*, punished by death.<sup>53</sup> The distinction between the two offenses is based on the traditional roles of husbands and wives. Under the common law, wives' bad acts were generally attributable to their husbands and husbands were allowed to “correct” their wives.<sup>54</sup> Assault or murder by a wife against her husband, rather than being a crime against an equal, was a form of treason because of the husband's legal dominance over his wife.<sup>55</sup>

While crimes by men and women are no longer codified differently, men and women do appear to offend differently. Contrary to what the numbers cited above seem to indicate, some researchers have found evidence that there is no difference at all between men and women's treatment under the law, at least in cases of homicide. Rather, women

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50. O'Neill, *supra* note 48, at 221.

51. Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 103 (2006) [hereinafter Ramsey, *Intimate Homicide*].

52. See Keller, *supra* note 39, at 263.

53. This offense also existed under California law. CAL. PENAL CODE § 191 (West 2010) (abolishing common law petit treason in 1872).

54. Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 304 (1995) (citing WILLIAM BLACKSTONE, COMMENTARIES 444 (Chitty ed., 1900)).

55. Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33 107 n.2 (2010).

receive shorter sentences than men due to legal factors that indicate that these women are, in fact, less serious offenders. Women convicted of homicide frequently have no prior criminal record, and commit homicide under circumstances considered less serious according to controlling statutes.<sup>56</sup> For instance, women are less likely to have prior convictions, and any prior convictions are unlikely to be for a prior violent offense.<sup>57</sup> Further, felony murder statutes account for a high percentage of men on death row, but a much lower percentage of women.<sup>58</sup> Victor Streib argues that a number of aggravating factors contemplated by state capital homicide statutes tend to affect men more than women as they tend to be geared toward punishing behavior that is more typically male.<sup>59</sup>

While men and women both use physical force in altercations within intimate relationships,<sup>60</sup> there are distinctions between male on female violence and female on male violence. Male aggressors are more likely to seriously harm their female partners,<sup>61</sup> and women are far more likely to be murdered by an intimate partner than are men.<sup>62</sup> Further, statistics such as those cited *infra* regarding weapon use may point to the size differential between women and men.<sup>63</sup> Paradoxically, weapon use by women may be an indicator of self-defense or of previous altercations preceding the violent incident.<sup>64</sup> Such an inquiry is likely to be highly fact-specific. However, because using a deadly or dangerous weapon makes a crime legally more serious,<sup>65</sup> it is important to analyze the ways in which use of deadly or dangerous weapons may be, in some contexts, more deserving of leniency.

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56. See Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 616–17 (2006) (describing typical aggravating factors in death penalty statutes that are more likely to apply to male than female defendants, such as felony murder and prior convictions).

57. *Id.*; see also HEIDENSOHN, *supra* note 38, at 44 (citing English data).

58. Streib, *supra* note 56, at 617.

59. *Id.* at 616–20.

60. See generally SMITH & FAROLE, JR., *supra* note 25, at 1. (finding both male and female defendants in intimate partner violence cases and both male and female parties found guilty).

61. See CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 2 (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=608> (finding that 68% of all intimate partner violence against men and 65% of all intimate partner violence against women involved simple assault, the least serious form of violence addressed by the study).

62. SHANNAN CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 3 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2020> (finding that in 2007, females were twice as likely to be killed by an intimate partner as were males). While an analysis of the role of race in male-female sentencing decisions is beyond the scope of this Note, it is worth mentioning that Black females were four times as likely as white females to be murdered by a boy- or girlfriend, and twice as likely as white females to be killed by a spouse. *Id.*

63. See *infra* Part V.B.1.

64. See CAROL SMART, WOMEN, CRIME, AND CRIMINALITY: A FEMINIST CRITIQUE 17 (1977).

65. See, e.g., California weapons enhancement statutes cited *infra* Section IV.C.

Women's crimes are less likely than men's to be violent, and they are also less likely to be committed against strangers or acquaintances; while most men's victims are strangers, women's victims are usually family members.<sup>66</sup> Killings of family members (excluding children) tend to be subject to a "domestic discount" and are less likely to result in a capital sentence.<sup>67</sup> The death penalty is a rare consequence of domestic homicide, no matter the sex of either offender or victim.<sup>68</sup> Examining offenses for which women and men are condemned to die provides an interesting contrast. According to Elizabeth Rapaport, "hot-blooded killing, striking out in anger at one who has injured or inflamed his or her killer, is regarded as less reprehensible than premeditated or predatory killing" in the law generally.<sup>69</sup> In her study of homicide cases in six states, from 1978 to 1989, Rapaport found that of men sentenced to death, fewer than 12% were sentenced to die for domestic homicides, defined as murders of family members or intimates.<sup>70</sup> Of the women sent to death row during the same period, nearly half were domestic killers.<sup>71</sup>

Comparing men's and women's crimes overall further illustrates the differences between the ways in which men and women offend overall (or at least the crimes for which they are convicted). Women who go to prison are much less likely than men to be imprisoned for violent crime. In California, 56.1% of men in prison as of June 30, 2009, were incarcerated for crimes against the person, e.g. assault, battery, sexual assault and homicide.<sup>72</sup> In contrast, a third of women were in prison for crimes against the person, and 35.4% of incarcerated women were those convicted of property crimes, e.g. theft, burglary, and fraud.<sup>73</sup>

However, among prisoners serving sentences for crimes against the person, a higher proportion of women than men are serving sentences for

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66. TRACY L. SNELL & DANIELLE C. MORTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991, at 3 (1994), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=569>. Intimates are typically defined as current and former spouses and significant others. See *id.* This study breaks perpetrators into the categories of intimates, relatives, well-known non-intimate non-family members, acquaintances, those known by sight only, and strangers. *Id.*

67. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1508 (1996) [hereinafter Rapaport, *Domestic Discount*].

68. Elizabeth Rapaport, *The Death Penalty and the Domestic Discount*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 224, 224 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter Rapaport, *Death Penalty*].

69. *Id.* at 224.

70. *Id.* at 225.

71. *Id.*

72. PRISON CENSUS DATA, *supra* note 23, at tbl.3.

73. *Id.* at tbls.2 & 3. While the data does not explicitly describe which crimes belong to which categories, they were verified by checking combined figures for related offenses in Table 2 against figures given for each category in Table 3. Personal crime includes offenses such as assault, rape, and homicide.

homicide.<sup>74</sup> Murder and voluntary manslaughter account for just over a tenth (12.2%) of women's prison sentences overall, but comprise more than a third (36.1%) of women's sentences for crimes against the person.<sup>75</sup> In comparison, homicide accounts for fully 16.8% of men's offenses overall, but less than one-third (29.9%) of men's sentences for personal crime.<sup>76</sup> In other words, women are less likely than men to be incarcerated for violence, but among those incarcerated for personal crime, women are more likely than men to have committed homicide.

At first glance, these numbers appear to contradict any notion that women commit less serious crimes than men—if homicide is the most serious criminal offense, and it makes up such a large proportion of women's violent crimes, does that not point to women's propensity for violence? A few caveats place these figures in context. First, these proportions refer to very different numbers of offenders in each category. 26,320 men were incarcerated for homicide in California as of June 30, 2009, as opposed to only 1351 women.<sup>77</sup> Women comprised approximately 6.5% of the California prison population as of June 30, 2009,<sup>78</sup> and make up less than 5% of those prisoners incarcerated for homicide.<sup>79</sup> Second, the category of crimes against the person includes sex crimes, for which men are much more likely to be incarcerated than are women—less than 1% of Californians jailed for a sex offense are women.<sup>80</sup>

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74. See PRISON CENSUS DATA, *supra* note 23, at tbl.3. Defined as murder and nonnegligent homicide. See, e.g., CATALANO ET AL., *supra* note 62, at 7. In the terms of the California statutory definitions this includes first- and second-degree murder and voluntary manslaughter. See CAL. PENAL CODE § 187 (West 2010) (defining murder as “the unlawful killing of a human being, or a fetus, with malice aforethought”); CAL. PENAL CODE § 189 (West 2010) (defining first- and second-degree homicide); PENAL § 192(a) (defining voluntary manslaughter as “the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion”).

75. See PRISON CENSUS DATA, *supra* note 23, at tbl.3. Vehicular homicide convictions are excluded from discussion of homicide for the purposes of this Note.

76. See *id.* at tbls.2 & 3.

77. See *id.* at tbl.2 (showing 11,925 men in prison for first-degree murder, 11,322 for second-degree murder, and 3073 for manslaughter, totaling 26,320 men incarcerated for homicide). The same table shows 497 women in prison for first-degree murder, 588 for second-degree murder, and 266 for manslaughter, totaling 1351 women incarcerated for homicide. See *id.*

78. See *id.* As of June 30, 2009, 11,033 women were in prison in California, out of a total prison population of 167,981 people. *Id.*

79. See *id.* 1351 women are in prison for homicide, out of a total of 27,671 prisoners convicted of homicide. *Id.*

80. See PRISON CENSUS DATA, *supra* note 23, at tbls.2 & 3. Specifically, 15,241 men are in prison for sex offenses including rape, lewd acts with a child under the age of fourteen, oral copulation, sodomy, penetration with a foreign object, and other sex offenses. *Id.* This figure represents 9.7% of men's crimes overall, and 17.3% of men's crimes against the person. *Id.* In contrast, only 100 women are in prison for sex crimes, which represents less than 1% of women's crimes of conviction in this population and only 2.6% of women's crimes against the person. *Id.* Of the total number of those incarcerated for a sex offense, less than 1% were women. *Id.*

Third, while men's victims are most likely to be male acquaintances and strangers, women are still more likely to be killed by an intimate or former intimate than anyone else.<sup>81</sup> Finally, while the majority of women's victims are intimates or family members, as of 2007, women still made up the large majority of victims of intimate homicide in the United States.<sup>82</sup> Thus, while the domestic discount affects both men and women's sentences, it arguably has more of an impact on men's sentences. Rapaport argues this discount demonstrates the relative seriousness with which the murder of a supposedly trusting partner is viewed as opposed to the murder of a stranger or adversary.<sup>83</sup> Applying the "evil woman" theory, one would argue that the reason so many women on death row are there for domestic crimes is because they betrayed their families' trust. This perspective further contends these crimes are offenses not just against individual victims, but against the concept of motherhood and femininity.

An increase in arrests and convictions of women in recent decades has raised questions regarding whether women are becoming more criminal or violent.<sup>84</sup> Certainly reliance on arrest and conviction rates as an accurate reflection of incidence of crime would support this contention. Darrell Steffenmeier, et al., found that over the same twenty-three year period, while the Uniform Crime Reports showed an increase in the arrests and prosecutions of women nationwide, the National Crime Victimization Survey showed no increase in self-reports of victimizations by female perpetrators.<sup>85</sup> Indeed, between 1993 and 2007, while the overall rate at which women were murdered fell more than the rate for men did (a 34% decrease for women compared to a 30% decrease for men), men's murders

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81. CATALANO ET AL. *supra* note 62, at 3. "In 2007, 24% of female homicide victims were killed by a spouse or ex-spouse; 21% were killed by a boyfriend or girlfriend; and 19% were killed by another family member." *Id.* Thus, 45% of homicides of women in 2007 were by a current or former intimate. *Id.*

82. *Id.* "Females made up 70% of victims killed by an intimate partner in 2007, a proportion that has changed very little since 1993." *Id.* Further, "[f]emales were killed by intimate partners at twice the rate of males." *Id.*

83. Rapaport, *Domestic Discount*, *supra* note 67.

84. See, e.g., Bonnie Erb , *Are Women Becoming More Violent?*, POLITICS DAILY (Nov. 13, 2009), <http://www.politicsdaily.com/2009/11/13/are-women-becoming-more-violent/> (discussing videos of female on female violence, as well as female aggression in a college soccer game that resulted in a suspension of a player); see also Sophie Goodchild, *Women Are More Violent, Says Study*, THE INDEPENDENT, (Nov. 12, 2000), <http://www.independent.co.uk/news/uk/home-news/women-are-more-violent-says-study-622388.html> (discussing a study showing that women are more violent in interpersonal relationships with men than previously thought, and quoting a researcher as saying that women are more violent in Western nations where "they were 'economically emancipated' and therefore not afraid of ending a relationship").

85. Darrell Steffenmeier et al., *Gender Gap Trends for Violent Crimes, 1980 to 2003: A UCR-NCVS Comparison*, 1 FEMINIST CRIMINOLOGY 72 (2006) (finding that while the Uniform Crime Reports indicate that arrests of women increased over the twenty-three-year period examined, victimization reports did not change regarding proportion of victims reporting violent offenses committed by women).

by intimate partners fell at a greater rate than that of women murdered by intimate partners (36% versus 26%).<sup>86</sup> The number of men killed by intimate partners was already much lower than the number of women killed by intimate partners; in 1993, 1100 men and 2200 women were killed by intimate partners.<sup>87</sup> In 2007, 700 men and 1640 women were killed by intimate partners.<sup>88</sup> In 2007 the number of women killed by intimate partners was greater than the number of men killed by intimate partners in 1993.<sup>89</sup> Put another way, in 2000, a third of homicides of women were committed by intimate partners, as compared to less than a tenth of those committed against men.<sup>90</sup> Further, in 2001, nonfatal violence against men was committed by an intimate partner only 3% of the time, but intimate partners committed 20% of nonfatal violence against women.<sup>91</sup> There is evidence that some means of intervention or resources that allow women to leave their violent partners, such as access to welfare benefits and mandatory arrest policies, reduce the likelihood of domestic homicide.<sup>92</sup> Some intervention methods may provoke retaliatory violence, such as prosecuting violations of protective orders without providing actual protection of women with protective orders.<sup>93</sup>

It is also informative to compare the tendency of men and women to use weapons in intimate partner violence cases. In one national study of nonfatal intimate partner violence cases, women were found to be more likely than male defendants to use a weapon during an incident of intimate partner violence, twice as likely to use a knife or sharp object, and three times more likely to use a blunt object.<sup>94</sup> Men used weapons in only a quarter of intimate partner violence cases, whereas women used weapons in 41% of intimate partner violence cases.<sup>95</sup> Men more often used "other" weapons, including personal weapons, defined as hands, feet, and fists.<sup>96</sup>

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86. CATALANO ET AL. *supra* note 62, at 3–4.

87. *Id.* at 4.

88. *Id.* at 2.

89. *Id.* at 2.

90. CALLIE MARIE RENNISON, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

91. *Id.*

92. Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 LAW & SOC'Y REV. 169, 190–92 (2003) (finding that decreasing access to welfare benefits is linked to higher rates of intimate homicide of African-American males, and mandatory arrest policies are linked to a decrease in homicides of married women across examined racial categories).

93. *Id.* at 192.

94. SMITH & FAROLE, JR., *supra* note 25, at 3.

95. *Id.*

96. *Id.*

Other studies have found that men are more likely to kill their female partners using personal weapons than vice versa.<sup>97</sup>

Domestic homicides may be a very different phenomenon than other types of crimes. Some have argued that women who kill their husbands, at least in the case of abused wives, differ significantly from the general population of women in prison.<sup>98</sup> Some studies show that battered women who kill their husbands tend not to have prior convictions, and they tend to be better-educated, older, and are more likely to be white than the average female inmate.<sup>99</sup> Additional evidence suggests that women who kill their partners tend to kill for different reasons than do men. A survey of women and men on death row for domestic homicide in the late 1970s found that 12% of the men and 48% of the women were there for domestic homicide.<sup>100</sup> Of those convicted for domestic killings, fully 69% of the women and only 13% of men were found to have committed the murder for financial gain.<sup>101</sup> On the other hand, 48% of the men and only 8% of the women were found to have killed their partner or a proxy victim in retaliation for their partner leaving them.<sup>102</sup> These figures may be seen to comport with stereotypes about "gold-digging" women, or to reflect the reality of female dependence on male financial support; similarly, separation killings by men reflect the notion that men who kill their family members do so to exert control or in anger at having their control and authority flouted.

Separation murders are of particular concern to advocates for battered women. Many factors affect whether a woman leaves an abusive partner, including personal motivations, children, family support, finances and severity of abuse.<sup>103</sup> However, fear of retaliatory violence is a very serious concern that has been shown to deter women both from reporting violence and from leaving. According to one researcher, "[t]hese separation cases differ from stereotypical domestic killings that flow out of arguments in that they are planned and followed the dissolution of a household or

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97. See, e.g., LANGAN & DAWSON, *supra* note 30, at 2; see also CRIMINAL JUSTICE STATISTICS CENTER, HOMICIDE IN CALIFORNIA: 2007, at 19 available at [ag.ca.gov/cjsc/publications/homicide/hm07/preface.pdf](http://ag.ca.gov/cjsc/publications/homicide/hm07/preface.pdf) (showing a higher proportion of female homicide victims killed via personal weapon than male homicide victims—7.9% versus 4.8%).

98. ELIZABETH LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 59 (2002).

99. *Id.* at 67–68.

100. Rapaport, *Domestic Discount*, *supra* note 67, at 1517.

101. *Id.*

102. *Id.*

103. See, e.g., DEFENDING OUR LIVES (Cambridge Documentary Films, 1983) (showing women convicted of spousal homicide discussing staying with their husbands out of hope they could work the relationship out, belief that abuse was a normal part of relationships, or lack of personal resources; similarly, at least one woman attempted to leave in order to protect her son).

relationship by weeks or months.”<sup>104</sup> Other studies have found that women are most at risk of being murdered by a husband or boyfriend when they leave that partner.<sup>105</sup> This phenomenon is an often cited statistic to point out one of the significant barriers to a woman successfully leaving an abusive relationship, and serves as a powerful response to the question “why doesn’t she leave?”

Thus, women and men are victimized by intimate partners at different rates; women are more frequently the victims of fatal intimate partner violence, and women and men commit intimate partner homicide at different rates. Intimate partner homicide makes up a higher proportion of the homicides committed by women than of those committed by men. Further, while frequency of intimate partner homicide has dropped in recent decades, the proportion of homicides of women attributable to intimate partners has remained roughly the same. Thus, despite an overall decrease in homicide rates in the United States in recent decades, intimate partner homicide remains a significant threat to women and to a lesser extent, to men. For this reason, it remains pertinent to investigate how juries view women who kill their husbands, in particular, whether and how women’s claims of spousal abuse affect the jury’s decision regarding culpability.

#### IV. THE SIGNIFICANCE OF THE BATTERED WOMAN SYNDROME AND THE JURY

##### A. BATTERED WOMAN SYNDROME

Battered women’s advocates have worked to counteract bias against women generally and battered women specifically; “[t]he question ‘why didn’t she leave?’ shapes both social and legal inquiry on battering; much of the legal reliance on academic expertise on battered women has developed in order to address this question.”<sup>106</sup> A woman who is abused by her husband may stay for any number of reasons: she may be afraid of retaliatory violence, she may not have the financial means to support herself, she may have left in the past only to have her husband come after her and force her to return.<sup>107</sup>

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104. Rapaport, *Domestic Discount*, *supra* note 67, at 1518.

105. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991), in *THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN* 165 (Karen J. Maschke, ed., 1997); *see also* RENNISON & WELCHANS, *supra* note 61, at 3 (finding that being divorced or separated were associated with higher rates of intimate partner victimization).

106. *Id.* at 5.

107. Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 306 (1995) (relating Del Martin’s 1975 study finding that women stayed with battering husbands due to social views that abuse was normal, flaws in the criminal justice system, economic pressures, fear of being unable to support their children, and fear that leaving would invite more dangerous repercussions than staying).



In 1979, psychologist Lenore Walker first wrote about Battered Woman Syndrome, which she intended to serve as an explanation for why women stay in abusive relationships and how they then come to kill their abusers.<sup>108</sup> Walker conducted a series of interviews with women in shelters which she said revealed the battering relationship as revolving around “the cycle of violence.”<sup>109</sup> According to Walker’s theory, the first phase of this cycle consists of tension-building, marked by “minor” battering incidents by the abuser while the victim attempts to keep peace by behaving in a submissive and conciliatory way.<sup>110</sup> Next, there is an acute battering act—an explosive incident in which the abuser channels tension that accumulated in the first phase into severe violence against the victim.<sup>111</sup> Finally, this incident is followed by a honeymoon period that lasts until the tension begins building again.<sup>112</sup> Eventually, according to Walker, the victim develops learned helplessness, a behavior first observed by Martin Seligman.<sup>113</sup> Seligman reported on the behavior of dogs shocked at seemingly arbitrary intervals until they would refuse to leave their cages even when the door was left open and shocks ceased altogether.<sup>114</sup> According to Walker, like those dogs the battering victim loses the ability to discern any options for leaving outside of either her own death or that of her abuser.<sup>115</sup> Continued increase in the severity of attacks may cause her to reasonably believe that she must kill her abuser in self-defense.<sup>116</sup>

Battered Woman Syndrome gained prominence in the 1980s and 1990s as it was introduced in at least some trials of women accused of murdering their spouses.<sup>117</sup> In 1992, the California legislature amended the Evidence Code to include an explicit provision allowing for the admittance of

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*See also* In re: Walker, 147 Cal. App. 4th 533, 538 (2007), discussed *infra* at note 268. Walker was attempting to leave her husband after he threatened to kill her when he came home and confronted her with a gun. *Id.* at 539–40. *See also* DEFENDING OUR LIVES (Cambridge Documentary Films, 1983). Sarah Buel, Assistant District Attorney for Suffolk County Domestic Violence Unit, tells of leaving an abusive husband in New York and fleeing to New Hampshire, only to have him come after her and take her by force from a laundromat while she pleaded with the other people present to call the police. *Id.* at 12:00–13:08. Buel tells how her husband simply told the others present that he was her husband, come to take her home, and “nobody moved.” *Id.*

108. Jill E. Adams, *Unlocking Liberty: Is California's Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?*, 19 BERKELEY WOMEN'S L.J. 217, 223 (2004).

109. *Id.*

110. *Id.* at 223–25.

111. Adams, *supra* note 108, at 224.

112. *Id.*

113. David Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 629–30 (1986).

114. *Id.* at 630; Adams, *supra* note 108, at 224.

115. Faigman, *supra* note 114, at 627; Adams, *supra* note 108 at 224.

116. Faigman, *supra* note 114, at 627; Adams, *supra* note 108 at 224.

117. *See, e.g.*, Faigman, *supra* note 114 at 619–20 n.6 (1986) (citing to appellate cases between 1979 and 1986 evaluating the appropriateness of Battered Woman Syndrome evidence to support self-defense claims by women who killed their partners).

Battered Woman Syndrome expert testimony in certain trials.<sup>118</sup> In 2002, the legislature added a provision to the Code that allowed people to file habeas corpus petitions if they were disallowed the right to introduce expert testimony on Battered Woman Syndrome and it was probable that inclusion such evidence would have resulted in a different outcome at trial.<sup>119</sup> Later, both statutes were amended to substitute “Intimate Partner Battering and its Effects” for “Battered Woman Syndrome,” though the rules remained otherwise unchanged.<sup>120</sup>

Many scholars, activists and advocates on all sides of the debate have criticized the use and codification of The Effects of Intimate Partner Battering (formerly known as Battered Woman Syndrome).<sup>121</sup> It has been criticized as junk science produced by improper methodology,<sup>122</sup> as promoting “victimhood” over responsibility,<sup>123</sup> and as both reinforcing sex stereotypes and only benefitting certain (white, middle class, and heterosexual) women.<sup>124</sup> Indeed,

[while] battered woman’s syndrome furthers the interest of some battered women, the theory incorporates stereotypes of limited applicability concerning how a woman would and, indeed, should react to battering. To successfully defend herself, a battered woman needs to convince a jury that she is a “normal” woman—weak, passive, and fearful. If the battered woman deviates from these characteristics, the jury may not associate her situation with that of the stereotypical battered woman.<sup>125</sup>

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118. CAL. EVID. CODE § 1107 (West 2010).

119. CAL. PENAL CODE § 1473.5 (West 2010).

120. Adams, *supra* note 108, at 225.

121. Intimate partner battering is the term often preferred by domestic violence advocates. *See id.* at 224–25 n.42 (citing *People v. Humphrey*, 921 P.2d 1, 7 n. 3 (Cal. 1996), in which the California Supreme Court notes the objections of domestic violence advocates to the use of Battered Woman Syndrome (BWS)). In 1991, the California Legislature provided for the introduction of BWS evidence without a Daubert hearing, and in 2000 the provision was updated to refer to The Effects of Intimate Partner Battering. The change was merely a degendering of the provision—the underlying statute was substantially unchanged. *See Adams*, *supra* note 108, at 225.

122. *See* David L. Faigman, *supra* note 114, at 619 (criticizing Lenore Walker’s methodology and urging courts to “allow juries to consider valid social science research and the battered woman’s own history of abuse in evaluating her self-defense claim”).

123. DERSHOWITZ, *supra* note 31.

124. *See* Allard, *supra* note 45 (asserting that Black and poor women are less able to successfully employ BWS arguments in front of juries who are likely to see them as aggressive and angry, and therefore to disbelieve their claims of timidity and fear); *id.* at 196 n.15 (discussing the “Sapphire” stereotype of a “shrill, nagging, hostile, and aggressive Black woman”).

125. Allard, *supra* note 45 at 193–94.

While Allard makes this assertion on behalf of Black<sup>126</sup> women, the same claim can be and has been made in regard to other marginalized groups, such as transgender individuals and individuals in same-sex relationships.<sup>127</sup> For instance, in *People v. Mata*, the prosecutor countered Ms. Mata's claim of self-defense in killing a man she claimed was trying to rape her by telling the jury that the victim had merely propositioned her.<sup>128</sup> He asserted that

[Bernina Mata] has a motive to commit this crime in that she is a hard core lesbian, and that is why she reacted to Mr. Draheim's behavior in this way. A normal heterosexual woman would not be so offended by such conduct as to murder.<sup>129</sup>

In another case in Oklahoma, in which a Black butch woman on trial for the murder of her more feminine partner claimed self-defense, "the State relied on sexist, racist stereotypes regarding Ms. Allen's butch identity and masculine appearance to defeminize, dehumanize, and prejudice her in front of the jury," and to portray her as the aggressive "man" in the relationship.<sup>130</sup> Allen's butchness and Blackness were used to cast her as an aggressive Black male and allowed the jury not just to convict her, but to sentence her to death.<sup>131</sup> Mata and Allen's cases illustrate Allard's point: not all women have equal access to the stereotypes on which Battered Woman Syndrome rests—women who are deviant or nonnormative in other ways may face additional barriers to benefiting from the frame Battered Woman Syndrome establishes. If a woman is subject to stereotypes of strength, aggression, or hostility, she may not succeed in convincing a jury that she was afraid for her life, because the jury may be more likely to see her as self-sufficient—more able to defend herself or leave—than a woman who they believe to be meek and docile.

According to the latter critique, the effectiveness of Battered Woman Syndrome evidence may be contingent on the effects of the "evil woman" theory.<sup>132</sup> Women who do not have access to frames of hegemonic

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126. Allard follows the convention of capitalizing "Black," identifying Black and other "minority" group descriptors as indicating cultural groups rather than describing skin tone. See *id.* at 192 n.5. "Inherent devaluation is communicated by the term 'black,' and so the capitalization also seeks to empower the cultural group." *Id.* This essay will follow her lead in this respect.

127. See Joey L. Mogul, *The Dykier, The Butcher, The Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473 (2005) (describing prosecutorial use of homophobic and sexist perceptions of lesbians to dehumanize women on trial for murder).

128. *Id.* at 485.

129. *Id.*

130. Mogul, *supra* note 128, at 490, (citing *Allen v. State*, 871 P.2d 79 (Okla. Crim. App. 1994)).

131. *Id.*

132. See Rapaport, *Questions*, *supra* note 36, at 512–13.

femininity may also not be able to access the benefits of Battered Woman Syndrome evidence effectively. If Battered Woman Syndrome rests on or its use invokes the same stereotypes that underlie judicial chivalry and the evil woman perspective, falling on the wrong side of the femininity divide could both bar a woman from benefiting either from formal evidence of the former or the informal bias of the latter.

## B. THE JURY

In the American system, criminal defendants have the right to trial by a jury drawn from a representative sample of the community.<sup>133</sup> At trial, issues of law are decided by the judge and issues of fact are found by the jury.<sup>134</sup> The judge rules on the admission of evidence—admitted evidence is reviewed by the jury to determine whether the prosecution has proven beyond a reasonable doubt the charges it has brought against the defendant.<sup>135</sup> At the close of the trial, the judge instructs the jury on the law; jurors must consider the evidence presented and the court's instructions to determine whether the crimes alleged were committed.<sup>136</sup> Juries are not informed of the sentence associated with the offense or offenses charged.<sup>137</sup> In capital cases, if the jury returns a guilty verdict, a second hearing is held in which the jury determines whether the offender will be sentenced to die.<sup>138</sup>

Jurors try individual cases, not theories of law, and seemingly disparate sentences or convictions within a handful or even a large group of cases are not necessarily reflective of an overall trend. Studies have demonstrated that jurors are not, as once thought, blank slates who can absorb the facts of a case and the instructions given by the judge and come to a legally correct conclusion without referencing any external information.<sup>139</sup> In one study, juror verdicts under two different insanity instructions, the Model Penal

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133. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“The unmistakable import of this Court’s opinions since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”).

134. See CALJIC 1.00 (defining the judge as finder of law and jury as finder of fact).

135. See Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 683-84 (2000) (discussing the judge’s instructions to the jury on evidence to be considered in deliberations); see also Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 79 (2003). “[T]he prosecutor must prove the facts under the rules of evidence and with the burden of the reasonable doubt standard.” *Id.*

136. Cohen, *supra* note 136, at 682.

137. Barkow, *supra*, note 136. “[M]ost jurisdictions forbid judges and parties from instructing the jury about penalties.” *Id.*

138. See e.g. CAL. PENAL CODE § 190.1 (West 2010) (providing for a separate hearing regarding penalty in capital cases after a determination of guilt and finding of special circumstances have been reached).

139. See Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. OF PERSONALITY & SOC. PSYCHOL. 857 (1991) [hereinafter Smith, *Prototypes*].

Code test<sup>140</sup> and the traditional common law M'Naghten rule<sup>141</sup> "[were] indistinguishable from those given an 'insanity' instruction that specifies no definition of the term."<sup>142</sup> This indicates that despite the different requirements of the rules, jurors have a preexisting idea of what "insanity" constitutes, and apply that concept in making determinations at trial, even after being instructed on the requirements of the law.

According to Vicki Smith, jurors determine whether a crime has occurred not by examining the facts presented at trial and applying them to the legal test provided by the court, but by determining whether the incident(s) described fit their prototype of the crime.<sup>143</sup> Further, "jurors lay construct of insanity shifts unpredictably as experimenters alter the facts. The considerations that strike jurors as decisive in one case turn out to be irrelevant, or decidedly less important than some other previously irrelevant consideration, in the next case."<sup>144</sup> If jurors have predetermined notions of what actions or attributes constitute a particular type of offense, what does this mean for women and men who kill their spouses? Perhaps verdicts in such cases are determined not by the instructions of the judge, but the extent to which the victim and offender in each case fit the jurors' notions of who is deserving of protection and who has behaved in ways that require censure. This would align with both the picture painted by Allard and that painted by advocates for Battered Woman Syndrome evidence. If jurors need to be convinced not that a decedent gave the defendant reasonable fear of imminent danger of great bodily harm or death (the legal standard for proving self-defense), but also that he was bad and she good, Battered Woman Syndrome evidence makes sense as a strategy. While evidence of past abuse alone would demonstrate that the decedent behaved violently in the past (where such is true), Battered Woman Syndrome evidence allows a defense attorney to argue that her client was insensate with fear brought on by repeated and ongoing mistreatment—not in terms

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140. The Model Penal Code terms insanity a "mental disease or defect excluding responsibility," and defines it as follows:

[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

Model Penal Code 4.01(1) (1985).

141. The M'Naghten standard comes from a House of Lords case in which the court declared that the defendant could be found guilty by reason of insanity if:

at the time of committing the act, the defendant was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

8 Eng. Rep. 718 (H.L. 1843). See Dan M. Kahan, *Lay Perceptions of Justice Vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793 (2000).

142. *Id.* at 795.

143. Smith, *Prototypes*, *supra* note 140, at 869.

144. Kahan, *supra* note 142, at 795.

of previous discrete incidents, but by a constant state of fear contextualized by the cycle of violence testimony. Further, Allard's critique has bearing here as well—if jurors must be convinced that a defendant fits the prototype of “victim” and that prototype is culturally informed, stereotypes of femininity and racialized aggression versus submissiveness will inform how well the defendant succeeds in that effort.

Although jurors are instructed to follow the law as explained by the judge, they do retain the power to nullify—that is, to decline to find the defendant guilty despite the prosecution having proved the elements of the crime. In the colonial era, jurors served to protect the community against the threat of an overreaching government.<sup>145</sup> Throughout the eighteenth century, this focus continued, complete with judges or lawyers instructing juries that in addition to deciding facts, they must determine whether the law should be applied.<sup>146</sup> Efforts to constrain the jury began in the nineteenth century, including the doctrine of directed verdict and the advent of detailed and specific jury instructions.<sup>147</sup> While jury independence resulted in refusal of northern courts to enforce the Fugitive Slave Act in the nineteenth century,<sup>148</sup> this same refusal to apply the law also stymied federal efforts during Reconstruction to bring white lynch mobs and Klan members to justice.<sup>149</sup>

While juries are no longer instructed on jury nullification, they nevertheless retain this power. Nullification is highly disfavored and has been described by a federal court as contrary to the oath a juror takes to uphold the law.<sup>150</sup> Yet the standard for overturning a jury verdict is quite high, and little can be done to remedy cases where jury nullification results in acquittal. Part of the question in examining the treatment of men and women in court is whether the jury will apply the law equally to parties of either sex—if jurors truly apply notions of chivalry to women defendants, one would expect to see nullification as one common outcome. In fact, in the nineteenth century, women accused of killing their husbands were often found not guilty based on tales of “physical abuse and dishonor” by male juries.<sup>151</sup> Though prosecutors sought the highest charge available, male

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145. JOSHUA DRESSLER AND GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 1061 (3d ed., 2006).

146. Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 176 (1972).

147. *Id.* at 177.

148. *Id.*; Fugitive Slave Act, ch. 60, §§ 1–10, 9 Stat. 462 (1850).

149. Albert W. Aschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 890–91 (1994).

150. Irwin A. Horowitz, et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1207 (2001) (citing *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997)).

151. Ramsey, *Intimate Homicide*, *supra* note 51, at 103 (stating “juries, which by law were composed solely of men until the mid-twentieth century, acquitted women from all

jurors acquitted women who showed their maltreatment by the purported victim.<sup>152</sup> One study has shown that women arrested for spousal homicide are more likely to be acquitted than are men, with 14% of women acquitted at trial compared to only 2% of men.<sup>153</sup> However, the women in the study were less likely than the men to be prosecuted, and those that were convicted or plead guilty tended to receive lower sentences than did the men.<sup>154</sup> While these contrasts could indicate chivalrous behavior across the categories of prosecutors, judges, and juries, it is also possible that many women in the sample presented circumstances which made their killings legally less serious, such as by demonstrating actual, but unreasonable fear of their male partners, or prior abuse. While prior abuse does not justify a conviction of second-degree murder or voluntary manslaughter, it may help the jury to see the defendant as deserving of protection or compassion.

### C. HOMICIDE IN CALIFORNIA

Many of the arguments detailed above regarding chivalry are premised on judicial discretion in sentencing. Currently in California, as with much of the country, judges hearing murder cases have little to no discretion in sentencing. Sentences are mandated by statute according to offense.<sup>155</sup> The three homicide offenses examined here all have sentences determined by statute. Murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought."<sup>156</sup> Murder is divided into two degrees according to intent. First-degree murder is defined by California law as being affected by a list of specific methods, and "by any other kind of willful, deliberate, and premeditated killing" or committed during specific felonies.<sup>157</sup> Second-degree murder is any other "unlawful killing . . . with malice aforethought" that is not either committed during specific dangerous felonies, or is not "willful, deliberate, and premeditated."<sup>158</sup> A person convicted of first-degree murder of her spouse will receive either twenty-five years to life, life without parole (LWOP) or the death penalty.<sup>159</sup> Death or LWOP sentences are given when particular special circumstances are found,<sup>160</sup> such as lying in wait,<sup>161</sup> murder with poison,<sup>162</sup> murder by

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social classes or found them guilty of lesser-included offenses, crediting their stories of physical abuse and dishonor").

152. Ramsey, *Intimate Homicide*, *supra* note 51, at 103.

153. LANGAN & DAWSON, *supra* note 30, at iii.

154. *Id.*

155. See, e.g., CAL. PENAL CODE § 190(a) (West 2010) (laying out the three possible sentences resulting from a conviction for first-degree murder).

156. *Id.* § 187(a).

157. *Id.* § 189.

158. *Id.*

159. *Id.* § 190(a).

160. PENAL § 190.2(a).

161. *Id.* § 190.2(a)(15).

162. *Id.* § 190.2(a)(19).

torture,<sup>163</sup> or murder for pecuniary gain,<sup>164</sup> to name a few. Second-degree murder, murder that is intentional but not premeditated,<sup>165</sup> earns a sentence of fifteen years to life.<sup>166</sup>

Manslaughter is an “unlawful killing without malice.”<sup>167</sup> It may be voluntary, involuntary, or vehicular.<sup>168</sup> This Note deals only with voluntary manslaughter. Voluntary manslaughter, murder that is intentional but in which malice is negated by heat of passion or sudden quarrel,<sup>169</sup> receives a sentence of either three, six, or eleven years.<sup>170</sup> Malice may be express or implied.<sup>171</sup> Express malice is “a deliberate intention unlawfully to take away the life of a fellow creature.”<sup>172</sup> Implied malice is found when “no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”<sup>173</sup> Thus, sufficient provocation will negate malice.

Sentences may be increased if the jury finds true enhancements. In these cases, the most common enhancements are weapons enhancements. A defendant may be at risk of anywhere from one year consecutive to the murder sentence<sup>174</sup> to an additional twenty-five years to life depending on the enhancement found true.<sup>175</sup> Thus, a defendant may receive a conviction of second-degree murder, but be sentenced to forty years to life for “personally and intentionally discharging a firearm, proximately causing great bodily injury or death.”<sup>176</sup> While juries may not be informed of the attendant sentence for a crime or special circumstance charged, they certainly are informed of the various elements of the crimes charged, and of which offense is most serious. In a system with so little judicial discretion, prosecutorial discretion in charging and plea bargaining is much greater. Thus, a prosecutor may either choose to charge an offense degree less than first-degree murder, or may choose not to seek a special circumstance charge for any number of reasons that are not reviewable. By the same token, a prosecutor may threaten very serious charges in order to get a plea for a lesser offense.

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163. PENAL § 190.2(a)(18).

164. *Id.* § 190.2(a)(1).

165. *Id.* § 189.

166. *Id.* § 190(a).

167. *Id.* § 192.

168. *Id.* § 192(a)–(c).

169. *Id.* § 192(a).

170. *Id.* § 193(a).

171. *Id.* § 188.

172. *Id.*

173. *Id.*

174. *Id.* § 12022(a)(1) (prescribing the additional and consecutive term of imprisonment for persons armed with a firearm in commission of a felony).

175. *Id.* § 12022.53(d) (prescribing the additional and consecutive term of imprisonment for persons who, in commission of murder or other specific felonies, personally and intentionally discharge a firearm and proximately cause great bodily injury or death).

176. *Id.*



## V. THE CASES

The following section will analyze the sample cases in two ways, to address two different questions. First, the quantitative section will seek to answer the question of whether women and men are punished differently by analyzing the relationships between gender and degree of offense, weapon used, and enhancements found true. Next, the qualitative section will take a closer look at some of the women's cases to address the question of how the gendered nature of women's crimes affects the motives imputed to them by courts, and how that, in turn, affects their sentences. Finally, this section will conclude with a discussion addressing how these legal and nonlegal factors interact in the sample cases.

### A. METHODOLOGY

The sample consists of seventy-three appellate cases for convictions of spousal homicide<sup>177</sup> in which the crime was committed during or after the year 1990;<sup>178</sup> defendants included fourteen women and fifty-nine men. Cases were found by keyword search on Westlaw in the Fall of 2009. Records were excluded if neither degree of offense nor sentence were explicitly stated. Records stating first- or second-degree murder and no sentence were included, but where the sentence could not be deduced from the information in the opinion, those cases are not included in discussions of sentence length. Similarly, where sentence was disclosed but not degree of offense, the case was included as degree of offense may be determined by inference based on sentence. Records were similarly excluded when the offense was committed against multiple victims.<sup>179</sup> The cases include parole denial appeals, habeas corpus petitions, and appeals from conviction. All appeals concerning the same defendant for the same offense were consolidated. The cases were examined to identify relevant factors and then coded by form and entered in a Microsoft Excel spreadsheet. Data were stored and edited in Excel and analyzed in Excel and SPSS.

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177. The cases were limited to opposite-sex couples, either spouses or long-term cohabitating partners, in which one partner murdered the other in California after 1989. While murders are committed by non-cohabitating significant others, limiting the sample to partners who cohabitated before or at the time of the murder restricted the set of issues involved. Cases with same-sex couples were excluded for similar reasons: the law's treatment of LGB individuals and same-sex relationships has changed dramatically over the last twenty years and it would not be possible to control for those changes in examining the cases. These issues were beyond the scope of this paper.

178. 1990 was chosen as a cutoff date to accommodate the need for a discrete timeframe, and because the California homicide statute was changed in 1990 when the special circumstance provisions were updated.

179. While they are excluded from the analysis because of the many ways in which a multiple murder case can obscure or taint judgments about one count, a few of these cases will be discussed in the qualitative section below.

Because the sample, particularly the sample of women, is so small, this examination of the data will produce no predictive results, but should be considered for hypothesis-producing purposes only. Determining whether these data correspond to larger patterns in the population of California spousal homicides requires further research. Further, there are inherent limitations to the data in that they are collected from appellate opinions. These records contain very little information on the race and age of either the defendants or decedents. This leaves two potentially significant variables out of the analysis that could have a bearing on the outcome of the cases.<sup>180</sup> Further, because the cases come from counties across California, where there may be very different rates of spousal homicide and different prosecutorial policies regarding charging, important local trends may be obscured. Finally, appellate records do not provide perfect recitations of the facts of a particular case; they necessarily are limited to the information necessary to decide the issues before the court. Thus, some of the records in this study had detailed information regarding the relationships between the defendants and victims, while others were largely limited to recitation of procedural history. This variety means that some inaccuracies regarding individual cases are inevitable, and underscores the need for a closer look at the trends observed and discussed in this Note.

The cases in the sample come from twenty of the fifty-eight counties in California.<sup>181</sup> As of the 2000 U.S. Census, these counties accounted for more than 87% of California's population.<sup>182</sup> The fifteen most populous counties as of 2000 are all included, as are all counties with a population density greater than 1000 people per square mile.<sup>183</sup> Additionally, these counties accounted for at least 86% of domestic violence arrests that occurred in California each year from 1989 to 1998.<sup>184</sup> The counties not represented in the data, include many that have small populations; therefore, their exclusion should not call into question the hypothesis-producing utility of this Note.

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180. A number of sources show a correlation between each of age, ethnicity, race, and rate of abuse. See e.g. ALICIA BUGARIN, CALIFORNIA RESEARCH BUREAU, *THE PREVALENCE OF DOMESTIC VIOLENCE IN CALIFORNIA* 4 (2002), available at [www.library.ca.gov/CRB/02/16/02-016.pdf](http://www.library.ca.gov/CRB/02/16/02-016.pdf) (last visited Dec. 30, 2009); California Office of the Attorney General, *Homicide in California* at 22, 70.

181. The counties included in this data set are: Alameda, Contra Costa, El Dorado, Fresno, Kern, Los Angeles, Merced, Monterey, Orange, Riverside, Sacramento, San Bernadino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, Stanislaus, and Ventura.

182. See U.S. Census Bureau, California by County <http://www.census.gov/census2000/states/ca.html> (select "State by County"). As of the 2000 Census, these counties accounted for 29,609,622 people, out of California's total population of 33,871,648. *Id.*

183. *Id.*

184. STATE OF CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, *REPORT ON ARRESTS FOR DOMESTIC VIOLENCE IN CALIFORNIA, 1998*, at 18 (1999), available at <http://ag.ca.gov/cjsc/pubs.php#domesticViolence>, (last visited Dec. 30, 2009).

## B. QUANTITATIVE ANALYSIS: GENDER, WEAPONS, AND ENHANCEMENTS

This qualitative section will demonstrate that first, the way we construct "intent" and second, our policy choices regarding which means of killing we penalize more severely, affect men's and women's cases in different ways. The examination of weapons used in homicides will demonstrate that women and men use different means to kill. Analysis of the relationship between weapon used and degree of offense will show that while most weapons have little to no observable affect on the degree of conviction in the cases discussed here, use of personal weapons makes a conviction for first-degree murder unlikely. Finally, examining the relationship between weapon use and enhancements found true will illustrate that the policy choices behind levying additional penalties for certain kinds of killings have a perverse effect in the domestic arena by penalizing self-defense while ignoring a particularly brutal category of spousal homicide.

In the sample, the largest offense category among men was first-degree murder, followed closely by second-degree murder, with the category of voluntary manslaughter making up less than 5% of the men's cases (see Table 1). In contrast, the largest offense category among women was second-degree murder, followed by first-degree murder, with the category of voluntary manslaughter making up nearly one-fifth of the cases.

While the proportions are slightly different, this pattern can be seen in the population of all California prisoners serving time for murder convictions (see Table 2). Among men, the largest category of homicide offense is first-degree murder, followed closely by second-degree murder, with voluntary manslaughter a distant third. Among women, the largest category is second-degree murder, followed by first-degree murder, with voluntary manslaughter coming in third, but making up a much larger proportion of the cases than among men (nearly 20%, vs. approximately 12% among men).

These results support previous findings that women tend to be convicted of less serious offenses than do men. They do not, without further facts, constitute a finding that for spousal murder, women tend to be punished more severely than men.

### 1. Weapons

Studies previously cited have noted that men and women have different gun use patterns.<sup>185</sup> According to some sources, women use guns and

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185. SMART, *supra* note 64, at 16–17. "Women offenders . . . were far less likely to beat a victim to death or to use excessive violence, such as multiple stab wounds, on their victims." *Id.*; see also SMITH & FAROLE, *supra* note 25, at 3. 41% of female defendants in Smith & Farole's study, and 24% of male defendants used a weapon during an incident of intimate partner violence. *Id.* Female defendants were more likely to use a sharp or blunt object than were males. *Id.*

knives in intimate partner violence more frequently than men.<sup>186</sup> In the sample data, all but two women—over 90% of the sample—used a gun or a knife (see Table 3). In contrast, just over half of the men in the sample used a gun or knife, and more than one in five used a personal weapon—their fists, feet, or hands.<sup>187</sup> These findings are congruent with prior research on weapon use among women and men.<sup>188</sup>

Men and women both used guns and knives in cases which earned conviction in all four categories. However, men who killed with their hands and feet were unlikely to receive sentences for first-degree murder. While use of other weapons was not found to have a relationship to degree of offense, degree of offense was found to be dependent on use of personal weapons.<sup>189</sup> The caveat must be included that with a sample size this small, the results may not be replicated in a larger population. However, of the thirteen men who killed their wives by beating or strangling them to death, ten were convicted of second-degree murder, one was convicted of voluntary manslaughter, and only two were convicted of first-degree murder.

Intent may be inferred from the defendant's actions. The use of weapons other than personal weapons may serve as proxy for intent. Use of weapon and type of weapon used may indicate the defendant had the intention to kill, and may indicate whether that intent was unlawful, or based in reasonable apprehension of imminent danger of great bodily injury. That is, they may indicate the intent to kill unlawfully or in self-defense. Whereas beating someone to death permits the inference that the killing was the result of a physical altercation that got out of hand—negating first-degree murder—aiming and firing a gun has been found to show intent.<sup>190</sup> A knife may not signal intent as clearly—while a gun's main purpose is to kill someone with minimal personal force, knives have other, nonlethal uses, such as cooking. Nonetheless, a knife may serve as a better proxy for intent than personal weapons do since it augments an individual's physical strength and is likely to cause greater harm with less effort than the use of personal weapons. Given that women appear to use these weapons more frequently than men in intimate partner violence, they

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186. SMITH & FAROLE, *supra* note 25, at 3.

187. *See Id.*

188. *Id.*

189. Chi-square test,  $X^2 = 8.253$ , degrees of freedom = 2, significant at the 99% interval. This sample is too small to have a high degree of confidence, however.

190. *See Commonwealth v. Carroll*, 194 A.2d 911, 915 (Pa. 1963). "The specific intent to kill which is necessary to constitute a nonfelony murder, murder in the first-degree, may be found from a defendant's words or conduct or from the attendant circumstances together with all reasonable inferences therefrom, and may be inferred from the intentional use of a deadly weapon on a vital part of the body of another human being." *Id.* (internal citations omitted).

may be subject to the conviction of more serious offenses to the extent that such weapons signal intent to the court and jury.

Knives and guns may also signal self-defense. In particular, they are likely to be more useful to women in self-defense than other weapons, because generally women's physical stature limits the usefulness of their personal weapons in altercations with larger, stronger men. Knives require close physical proximity—for that reason, their use may be a good proxy for true self-defense quarrel, though such an inference is certainly fact-dependant. On the other hand, using a knife is very risky, precisely because it requires close proximity to the target. Knives are common household items, and smaller, weaker parties can use them to ward off larger aggressors, which is why they are common instruments in sudden, unplanned murders. At the other extreme, hiring a killer or using poison, as some women in the sample did, requires almost no physical proximity to the victim. This minimizes personal risk for an aggressor with less physical strength than her victim, and could compensate for women's typical physical disadvantages against a man in cases of premeditated murder.

A gun is useful in premeditated murder, self-defense, and intimidation. It is also useful against a person of greater physical strength. It is the great equalizer.<sup>191</sup> This dual nature is illustrated in the cases. Women in the sample who used poison or arranged for others to kill their husbands were all convicted of first-degree murder; the women who used knives were convicted of second-degree murder or voluntary manslaughter. Gun use is present in all three categories of offense.

## 2. Enhancements

Every woman but one in the sample was given at least one special circumstance or enhancement by the jury. Twenty-three out of fifty-seven (40.4%) of the men received neither a special circumstance nor weapons enhancement. This finding is clearly related to the foregoing discussion of weapon use. Women are unlikely to kill men using personal weapons, or by other means, which require overpowering men with physical force.

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191. This is not to say that women and men are equally likely to own or use a gun overall. Gallup polls have consistently shown higher gun ownership rates among men than women. The same is true for white respondents as opposed to respondents of color; older (thirty and up) as opposed to younger (eighteen to thirty) respondents; and respondents in the Midwest and South as opposed to Northeast and West. See *Gun Ownership and Use in America*, GALLUP (Nov. 22, 2005), <http://www.gallup.com/poll/20098/gun-ownership-use-america.aspx>. Gun ownership varies by income level. *Id.* Most of these factors cannot be controlled for in this study. Reference to guns as "the great equalizer" indicates merely that handgun or shotgun use does not place the same demands on the user for physical strength or proximity as do other hand-held weapons.

**Table 1: Degree of Offense by Sex of Defendants in Sample**

Degree of Offense	Sex		Total
	Men	Women	
First-Degree Murder	30	5	35
Second-Degree Murder	28	6	34
Voluntary Manslaughter	2	3	5
Total	60	14	74

**Table 2: Degree of Offense by Sex of California Prisoners Convicted of Murder**

Degree of Offense	Sex				Total
	Men		Women		
First-Degree Murder	11,925	45.3%	497	36.8%	12,422
Second-Degree Murder	11,322	43.0%	588	43.5%	11,910
Voluntary Manslaughter	3,073	11.7%	266	19.7%	3,339
Total	26,320	100.0%	1,351	100.0%	27,671

Table 3: Weapon Used by Sex of Defendant

Weapon Used	Sex			Total
	Men	Women		
Firearm	16	9	69.2%	25
Knife/Sharp Object	14	3	23.1%	17
Blunt Object	2	0	0.0%	2
Personal Weapon	13	0	0.0%	13
Multiple Weapons	3	0	0.0%	3
Other*	9	1	7.7%	10
Total	57	13	100.0%	70

\* Includes use of fire, use of pillow for suffocation, ligature, a plastic bag, and poison.

\*\* Percent totals add up to over 100% due to rounding error.

Table 4: Weapon Used by Enhancements Found for Sample

Weapon Used	Enhancement		
	Yes	No	Total
Firearm	22	2	24
% of weapon category	91.7%	8.3%	100.0%
% of enhance. y/n	55.0%	7.7%	
Knife/Sharp Object	12	3	15
% of weapon category	80.0%	20.0%	100.0%
% of enhance. y/n	30.0%	11.5%	
Blunt Object	1	0	1
% of weapon category	100.0%	N/A**	100.0%
% of enhance. y/n	2.5%	N/A***	
Personal Weapon	0	13	13
% of weapon category	N/A***	100.0%	100.0%
% of enhance. y/n	N/A***	50.0%	
Multiple Weapons	2	1	3
% of weapon category	66.7%	33.3%	100.0%
% of enhance. y/n	5.0%	3.8%	
Other*	3	7	10
% of weapon category	30.0%	70.0%	100.0%
% of enhance. y/n	7.5%	26.9%	
Total	40	26	66
% of enhance. y/n	100.0%	99.9%***	
% of Total Cases	60.6%	39.4%	100.0%

\* Includes use of fire, use of pillow for suffocation, ligature, a plastic bag, and poison.

\*\* Percent totals add up to less than 100% due to rounding error.

\*\*\* No value.



Defendants using guns received enhancements or special circumstances in every case in the sample. Knives triggered enhancements in most cases. But personal weapons did not trigger enhancements for use of a "dangerous or deadly weapon." If a means of killing that is immune to weapons enhancements is generally available to men and not to women, then to the extent that men employ that means they will receive more lenient sentences than women. Further, if men who commit murder with personal weapons use are unlikely to receive a conviction higher than second-degree murder, to the extent that men use weapons to commit murder, they will be convicted of first-degree murder less frequently.

In cases where the defendant used a gun, enhancements were given in all but one case. Where knives or other sharp objects were used, an enhancement was given in over 80% of cases, or fifteen out of eighteen times. Weapons enhancements are intended to discourage the use of firearms, and to a lesser extent, other "deadly and dangerous" weapons in the commission of violent crimes. While some firearms enhancements require personal use, or direct or proximate effects of gun use, merely being armed with a firearm during the commission of a felony is sufficient to incur a firearm enhancement. Other weapons receive enhancements when they are deemed "deadly or dangerous." Identifying an object used to kill as deadly or dangerous may be less straightforward than determining that a gun is a firearm for the purposes of an enhancement. While a knife may frequently be considered "deadly" or "dangerous," particularly once it has been used to commit murder, other items may be more ambiguous, and, thus, do not earn enhancements for the harm they are used to inflict. Examples of such "ambiguous" items used by sample defendants include pillows, plastic bags, or a floor or wall.

These findings may also indicate that weapons enhancements are always or very nearly always charged and found true for gun crimes, but that charging knife crimes may be subject to greater prosecutorial discretion and enhancements for remaining weapons are more discretionary still. If that is so, and knife enhancements are treated as optional, it is interesting that the women in the sample seemed to receive them more consistently than the men did. Of course, the sample contains many fewer women than men, so it is possible that men and women are charged with and convicted of weapons enhancements at similar rates, but that such a pattern cannot be observed here due to the limited sample size. If this is not the case, however, the higher rate of weapon enhancement convictions would support contentions that, in some cases, women are treated more harshly than men. It may also be that, because prosecutors are less likely to secure a harsh sentence with women defendants, they put more emphasis on enhancements than they would with a man, who would be more likely than a woman to receive a serious sentence, such as life without parole. Of the men's cases in which it appeared that possible enhancements were not

listed, two appeared to be life without parole cases, one was a twenty-five years to life case, and the remaining three were all second-degree murder cases in which the appellant was serving an indeterminate sentence of fifteen years to life.

Finally, for the purposes of prosecuting weapon use, it may be easier to prove gun use than the dangerous and deadly nature of other types of weapons. This is especially likely to be true when multiple factors could have contributed to the victim's death. For example, in one of the cases in which no enhancement was reported, the coroner determined the cause of death was ligature strangulation and the victim had marks on her neck consistent with ligature strangulation, but she had also been suffocated with a plastic bag, shocked with a stun gun, and beaten with a blunt object.<sup>192</sup> On the other hand, this defendant was found guilty of committing homicide by torture, so it may be that the prosecutor was less concerned with a weapons enhancement than with securing a sentence of life without parole or death, or that the reviewing court did not think the weapons enhancement significant enough to mention.<sup>193</sup>

Thus, it seems most likely that enhancements are routinely charged and found true for gun crimes, somewhat less so for crimes involving sharp objects, and occasionally but not routinely for crimes involving ligature strangulation and blunt objects.

### C. QUALITATIVE ANALYSIS: PROTOTYPES AND OUTCOMES

To examine whether mutual aggression and general "badness" levels seem to correspond with women's murder convictions, cases were divided into four categories. For the purposes of this discussion the one case involving a woman with multiple victims will be included, to offer the example of the most extreme situation observable here.<sup>194</sup> Cases are excluded in which neither specific enhancements nor aggregate sentence is discussed, making it impossible to judge final sentence.<sup>195</sup>

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192. *People v. Speights*, No. G039761, 2008 WL 4928014, at \*1 (Cal. Ct. App. Nov. 18, 2008).

193. *Id.* at 2.

194. It should be recalled that this case was excluded from the quantitative data in Section B, which examined outcomes based on the relationship between plaintiff and a single victim. See discussion *supra* Section B. "Multiple victims" is a special circumstance which, when found true, qualifies a convicted offender for life without parole or the death penalty. PENAL § 190.2(a)(17). Such an offense is necessarily considered more brutal and worthy of condemnation than a comparable offense with a single victim, whether in the arena of intimate partner violence or more "normal" violence. This may seem intuitively and normatively true. While this fact could influence the jury outside of any elements charged or found true, it is also a legal fact to be found by the jury. Thus offenses with multiple victims are legally different from offenses with a single victim.

195. See, e.g. *People v. Greer*, No. G030839, 2003 WL 21500700 (Cal. Ct. App. July 1, 2003).

The first category of cases is "Financial Gain," and consists of women who fit the stereotype of the gold-digging black widow.<sup>196</sup> The second is "Protection of Personal Interest," in which the facts as stated by the court indicate that the appellant had not acted in pursuit of profit, but had been protecting some other non-self-defense interest not recognized as legitimate. The third category is "Mutual Aggression" in which the facts, as related by the appellate court, indicate that the murder victim had physically harmed or severely emotionally abused the appellant, but in which there was also evidence of the appellate behaving in an aggressive or unkind way. The fourth and final category is "Actual Harm" in which the facts reported show that the appellant had not exercised violence outside of the homicidal act, but her husband did.

### 1. Financial Gain

This category represents arguably the worst of female crime against partners. Financial gain murders illustrate "[d]ependence turned to gall and greed; trust betrayed; love and duty mocked."<sup>197</sup> Women in this category have gone beyond self-interest, prioritizing money over love and intimacy, a quality reviled in women, whether they are "gold-digging" younger wives or prostitutes. The two women in this category are Mary Ellen Samuels, the only woman in the sample on death row, convicted of multiple murders in the same transaction<sup>198</sup> and Nora Andaya Bonnaudet, who is serving a sentence of life without parole for first-degree murder and the special circumstance of murder for financial gain.<sup>199</sup>

Mary Ellen Samuels hired her daughter's boyfriend to kill her former husband, telling the young man that Mr. Samuels had abused her daughter sexually.<sup>200</sup> She then became concerned that her ex-husband's killer would turn her in, and hired another man to kill the first hit man.<sup>201</sup> Samuels gained more than a quarter of a million dollars from her ex-husband's death, in revenue from his life insurance policies and uncashed payroll checks, combined with the sale of their Subway sandwich franchise and the refinancing of their home.<sup>202</sup> At her trial, the prosecutor introduced evidence that Samuels had spent all the money in a year,<sup>203</sup> but did not pay for her husband's funeral.<sup>204</sup> Further, police officers who were present at

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196. See Rapaport, *Domestic Discount*, *supra* note 67, at 1517.

197. *Id.*

198. *People v. Samuels*, 36 Cal. 4th 96 (2005).

199. *People v. Bonnaudet*, No. B164987, 2004 WL 1664018, at \* 1 (Cal. Ct. App. July 27, 2004).

200. *Samuels*, 36 Cal. 4th at 110.

201. *Id.* at 105.

202. *Id.* at 103.

203. *Id.* at 112 n.2.

204. *Id.* at 113.

the crime scene testified that Samuels was dressed and acting in a provocative manner.<sup>205</sup>

Nora Andaya Bonnaudet was twenty-four years younger than her husband, who was an illiterate but well-off handyman and real estate speculator.<sup>206</sup> When they married, he paid off her \$10,000 credit card debts and bought her a car; shortly thereafter he “executed a will that left ‘virtually everything’” to her.<sup>207</sup> Bonnaudet appears to have staged a robbery in which her husband was beaten to death.<sup>208</sup> The court’s opinion also implies that she took advantage of his illiteracy by putting her name on the deed to the house that he owned prior to their marriage.<sup>209</sup> Shortly after his death, Bonnaudet put the house up for sale, made withdrawals from his bank account to which she did not have her own ATM card, requested his life insurance policy worth about \$75,000 be paid out to her, and additionally requested that annuities in the amount of \$146,000 owed to him be transferred to her name.<sup>210</sup> She was also having an affair at the time of his death.

In both of these cases, there was no evidence credited by the Court that either husband had mistreated the appellant. Samuels began soliciting people to kill her husband beginning more than a year before his death, refused to pay for his funeral despite receiving his life insurance funds, and rather than showing distress or concern at her husband’s crime scene, behaved “provocatively.” Bonnaudet’s husband was displeased with his wife’s spendthrift habits and concerned about her co-ownership of his home. Further, he was a seventy-eight-year-old man who she apparently had beaten to death.<sup>211</sup> The common thread in these cases is that both of these women not only profited from their husband’s deaths, but also seem to have hired or made arrangements with other parties to carry out the killings. Both demonstrated callousness beyond that necessary for murder; Samuels not only hired a man to kill her husband, but hired another man to

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205. *Samuels*, 36 Cal. 4th at 113.

206. *Bonnaudet*, 2004 WL 1664018, at \*1.

207. *Id.* at \*1.

208. *Id.* at \*1–2. Bonnaudet witnessed her husband being assaulted by two men the morning of his death. *Id.* at \*1. Two men approached her husband in a parking lot, one hit him in the face and the other went through his pockets and took nothing. *Id.* That night she reported that the same assailants had returned after she and her husband reported the earlier attack, beat her husband and put him in his car. *Id.* However, the officer who interviewed her that evening testified that she told him the assailants were African-American, whereas she and her husband reported the initial attack as performed by two Arab-American appearing men. *Id.* \*1–2. Further, according to the coroner her husband had died between an hour and a half and two hours before the police arrived on the scene, whereas she reported the incident as having just occurred. *Id.* at \*2. Finally, the blood on her husband and the car was not consistent with him having been beaten outside the car and then placed inside it. *Id.* at \*2.

209. *Id.* at \*2.

210. *Id.*

211. *Bonnaudet*, 2004 WL 1664018, at \*2

kill the initial hit man.<sup>212</sup> Bonnaudet had her husband killed in a brutal way—by having him beaten to death.<sup>213</sup>

The combination of pecuniary gain and arranged murders demonstrates both intent and detached killing. These murders both satisfy legal requirements for premeditation and also fit neatly under the “evil woman” theory. Even without the gendered implications of the “black widow” stereotype associated with killings of this type, profiting from someone’s death, particularly one’s spouse, is easily considered evil. The repudiation of a wife’s role as compassionate and supportive, the moral center of the household, compounds this perception of the offense.

## 2. Self-Protection

The second category includes women who murdered out of self-interest or self-protection that was not rooted in self-defense but that was also not pecuniary in nature. These women wanted out of their marriages without risking a custody battle,<sup>214</sup> or were protecting themselves from the consequences of their drug use and extramarital affairs.<sup>215</sup> These behaviors are also seen as “bad,” but not to the same degree as those of the first group. The women in this group are pursuing or defending goals that are not all in themselves illegitimate: remaining with one’s children, getting out of a marriage in which one’s partner has sabotaged her success, or retaining a significant job and relationship are all recognizable legitimate goals. But the means by which these women pursued their goals—murdering their spouses—were illegitimate. While one of the women in this category did ask others to kill her husband, in the end, all of these women committed the murders themselves.

The sentences in this group are not quite as long as those in the previous group. The longest sentence in this group is that of Kristin M. Rossum, serving life without parole. Rossum killed her husband after he threatened to reveal to her employer that she was using methamphetamine and having an affair with her supervisor.<sup>216</sup> Rossum was addicted to methamphetamine when she and her late husband met.<sup>217</sup> He helped her to quit, and she returned to college and got a job at the Office of the Medical Examiner where she helped analyze drug samples for criminal prosecutions.<sup>218</sup> There she began having an affair with her supervisor and

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212. *Samuels*, 36 Cal. 4th at 105 (Cal. 2005).

213. *Bonnaudet*, 2004 WL 1664018, at \*2.

214. *People v. Provencio*, No. E027642, 2002 WL 31045485, at \*2 (Cal. Ct. App. Sept. 13, 2002).

215. *People v. Rossum*, No. D041343, 2005 WL 1385312, at \*2 (Cal. Ct. App. June 13, 2005).

216. *Id.*

217. *Rossum*, 2005 WL 1385312, at \*1.

218. *Id.* at \*1–2.

resumed using methamphetamine.<sup>219</sup> When her husband threatened to reveal her affair and her drug use to her supervisors if she did not quit, Rossum poisoned him with drugs that she and her lover apparently stole from the lab.<sup>220</sup>

The remaining two cases in this category include Karen Provencio, who is serving fifty years to life for first-degree murder for killing her husband in his sleep,<sup>221</sup> and Kim Pace-White, who is serving forty years to life for the murder of her husband for reasons not stated in the record, following years of reportedly subjecting him to routine bullying, if not abuse.<sup>222</sup>

Provencio's husband had stopped working, and the family's financial troubles included a home foreclosure and the loss of a business.<sup>223</sup> Provencio began talking about killing her husband with her neighbors, including offering a neighbor—her lover—\$100,000 to kill him.<sup>224</sup> While she told friends shortly before the killing that he was mean to her, Provencio said she could not leave because she did not want to share custody of their children.<sup>225</sup> Provencio killed her husband in December of 1998. Several times over the two years preceding the murder, she told her neighbor she wanted him dead, and Provencio once told her neighbor that she had gotten somebody to do it.<sup>226</sup> She asked two different lovers over the course of two years to kill her husband, and once told one of them that her sister had agreed to do it, but had “chickened out.”<sup>227</sup> She and her husband fought the night he died, and their children reported he was crying while she was in the other room making phone calls.<sup>228</sup> She shot him in the head while he was sleeping.<sup>229</sup>

Pace-White was convicted in part by testimony of neighbors that the victim was gentle and “easy-going” and that the appellant was domineering,<sup>230</sup> and a witness who had seen “[Pace-White] holding a gun and threatening to kill, or shoot, [her husband].”<sup>231</sup> Afterward, she fled to Alabama with her children, where she was arrested.<sup>232</sup> The facts in Pace-White's appeal do not paint a picture of motive. From the description given in the opinion, it seems possible that this is a case of a woman

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219. *Rossum*, 2005 WL 1385312, at \*2.

220. *Id.* at \*3, \*5.

221. *Provencio*, 2002 WL 31045485, at \*1.

222. *Pace-White*, 2002 WL 661557, at \*1.

223. *Provencio*, 2002 WL 31045485 at \*1.

224. *Id.* at \*1–2.

225. *Id.* at \*2.

226. *Pace-White*, 2002 WL 661557, at \*1.

227. *Id.* at \*2.

228. *Id.*

229. *Id.* at \*1.

230. *Id.*

231. *Id.*

232. *Id.*

abusing and then killing her male partner. Neighbors reported having seen Pace-White brandish a gun on previous occasions, sometimes at her husband.<sup>233</sup> One neighbor saw Pace-White "holding a gun and threatening to kill, or shoot, [her husband]."<sup>234</sup> The court reported finding no evidence in the record "that Mr. White was violent toward defendant at any time close to the time of his death."<sup>235</sup> Neighbors said Mr. White was "laid back and quiet" while Pace-White yelled at Mr. White and told him "to 'bow down' and 'worship' her."<sup>236</sup> The court rejected the appellant's contention in this context that appellant was a domestic violence victim, notwithstanding White's arrest for felony spousal abuse in 1996.<sup>237</sup>

That such a case would result in a lesser sentence than a self-defense case may be troubling, depending on how abuse is viewed. If partner abuse is predatory, as contract murder for pecuniary gain very arguably is, then a second-degree murder conviction and forty years to life seems appalling when the other seemingly predatory women in this sample received sentences of life without parole or death. If, on the other hand, domestic violence culminating in murder is "hot-blooded," a lower sentence for such killings comports with the law's general prioritization of "cold-blooded" killings as a more serious of an affront to social order than "crimes of passion."<sup>238</sup>

### 3. Mutual Aggression

In this group are women whose cases show evidence that, prior to the homicide, they endured is equivocal threats of violence, or of violent or threatening behavior from their husbands. The cases also show evidence of the women's aggressive or otherwise "bad" behavior outside of the homicidal act.

The defendant with the most lenient sentence in this category is Marilyn Hudnall-Johnson who killed her drug-abusing husband.<sup>239</sup> Hudnall-Johnson presented evidence that she had been abused in prior relationships and that her father had abused her mother.<sup>240</sup> She presented an expert who contended that her insistence on taking her husband back repeatedly following separations and despite his frequent theft from her to support his drug habit was a product of the abuse she had sustained in a previous marriage and the abuse she had witnessed growing up.<sup>241</sup> She

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233. *Pace-White*, 2002 WL 661557, at \*1.

234. *Id.*

235. *Id.* at \*6.

236. *Id.*

237. *Id.*

238. See generally Victoria Nourse, *Passion's Progress* 106 YALE L.J. 1331 (1997).

239. *People v. Hudnall-Johnson*, No. A119004, 2009 WL 499151, at \*5-6 (Cal. Ct. App. Feb. 27, 2009).

240. *Hudnall-Johnson*, 2009 WL 499151, at \*5-6.

241. *Id.* at \*8.

stabbed her husband during a struggle in which, she contended, he tried to break into their home. She admitted he had never broken in before and would likely have stopped trying to get in if she ignored him.<sup>242</sup> However, she also presented evidence that she was on pain killers and sleeping medication that night,<sup>243</sup> and that when her husband was high he was sexually demanding<sup>244</sup> and had frequently stolen her belongings to buy drugs.<sup>245</sup> On one such occasion, he did so when she was out of the house overnight, having been arrested for domestic violence against him.<sup>246</sup> Significantly, she was the only woman in the sample with prior domestic violence arrests,<sup>247</sup> as well as the only one with a prior conviction (for violating welfare regulations).<sup>248</sup>

The remaining two cases are both second-degree murder cases in which the defendants either showed evidence of psychological abuse but no evidence of significant physical abuse by the deceased husband,<sup>249</sup> or showed evidence of physical abuse that was met with evidence of the defendant's aggressive behavior, including threats and acts of aggression.<sup>250</sup> In both cases the prosecution raised the specter of mutual abuse in argument or via expert testimony.

In Patricia Johnson's case, a prosecution expert testified that Johnson and her husband were both "engaged in emotionally abusive and unhealthy behavior in their relationship, with each trying to control the other's behavior."<sup>251</sup> Johnson testified that her husband began having affairs and lying to her shortly after they moved in together.<sup>252</sup> She left but took him back when he promised to change, though each time this occurred he went back to his old ways.<sup>253</sup> She testified that she became anxious and could not work or function either when they were together or when she left him.<sup>254</sup> He began monitoring her behavior closely, making rules for when she could talk to him, told her he would charge her money for their vacation together, and on one occasion made her agree to let him have an affair if she accused him of cheating on her.<sup>255</sup>

At Loida Cruz's trial, evidence was introduced of her threats to her husband, an altercation that she and her brother insisted consisted of her

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242. *Hudnall-Johnson*, 2009 WL 499151, at \*5.

243. *Id.* at \*7.

244. *Id.* at \*6.

245. *Id.*

246. *Id.*

247. *Id.* at \*1.

248. *Id.*

249. *People v. Johnson*, No. D049357, 2008 WL 2068207 (Cal. Ct. App. May 16, 2008).

250. *People v. Cruz*, No. A107426, 2006 WL 2468762 (Cal. Ct. App. Aug 28, 2006).

251. *Johnson*, 2008 WL 2068207 at \*10.

252. *Id.* at \*2.

253. *Id.* at \*3.

254. *Johnson*, 2008 WL 2068207 at \*3.

255. *Id.*



husband beating her, whereas her sister-in-law's boyfriend insisted that the "fight" was actually her husband acting in self-defense.<sup>256</sup> The prosecution introduced a recording of an argument in which Loida Cruz threatened to kill her husband if he left her.<sup>257</sup> This recording was played as evidence of her serious intent to kill him, conveyed not only by the content but the tone of the recording.<sup>258</sup> The recording, which was in Tagalog, was also stopped and started throughout the argument as the appellant's husband intended to use it to discredit Loida in the future.<sup>259</sup> The deceased's relatives and ex-wife also testified he was gentle and that they had seen the appellant hit and threaten to kill him many times.<sup>260</sup> Cruz stabbed her husband forty-eight times;<sup>261</sup> she claimed to have grabbed the knife to keep him from hurting her after he reached for it during their fight.<sup>262</sup> She did not believe that she had actually inflicted all his wounds and testified that she did not mean to kill him.<sup>263</sup>

It is arguable that mixed evidence of aggression, or evidence that does not include physical harm, limited the ability of these women to access victim frames, such as those offered by Battered Woman Syndrome testimony. Johnson, who was not physically abused and did not act in a physically aggressive way or make threats prior to the homicide, received a conviction for second-degree murder.<sup>264</sup> Cruz, who had been treated violently and had acted violently, including making threats, received a conviction for second-degree murder.<sup>265</sup> Hudnall-Johnson, who had previously been arrested for spousal abuse and had admitted to stabbing her husband on a prior occasion, received a conviction for voluntary manslaughter.<sup>266</sup> This could mean that, at least on its own, "mutual aggression" has limited negative effect for women advancing abuse evidence.

These outcomes could also be an indication that in examining the relationship prior to the homicide, the worth of the decedent matters as much as the worth of the defendant. Hudnall-Johnson's husband was a drug user and while he hadn't physically harmed her previously, the fact that he had stolen from her while she was sleeping or out of the house may have made her husband seem less worth vindicating than Johnson and Cruz's husbands seemed. Further, Hudnall-Johnson stabbed her husband

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256. Cruz, 2006 WL 2468762, at \*13.

257. *Id.* at \*2.

258. *Id.* at \*16–17.

259. *Id.* at \*17.

260. *Id.* at \*14.

261. *Id.* at \*6.

262. *Id.* at \*10.

263. *Id.* at \*11.

264. Johnson, 2008 WL 2068207, at \*1.

265. Cruz, 2006 WL 2468762, at \*1.

266. Hudnall-Johnson, 2009 WL 499151, \*1.

only once, during a fight in which he had hurt her. Finally, she called the police as soon as she realized he was hurt. In contrast, Johnson shot her husband in his sleep, and Cruz stabbed her husband more than forty times and refused to call 911 or allow others to do so.

#### 4. Self-Defense

These cases are arguably the ones most affected by the use of prior battering evidence. In one appeal, a woman convicted of second-degree murder obtained a new trial based on her attorney's failure to present Battered Woman Syndrome evidence at her trial in 1991.<sup>267</sup> Originally sentenced to nineteen years to life in prison, Hudie Joyce Walker had been beaten regularly by her husband, and the morning of the shooting he pointed a gun at her and said "Today will be your last goddamned day on this Earth."<sup>268</sup> She was at their home attempting to collect her things and leave when he walked in.<sup>269</sup> She contended at her first trial that her husband reached for a gun he had tossed between them, and in the struggle to gain control of it before he did, the gun went off, accidentally shooting him.<sup>270</sup> She testified to years of abuse fueled by her husband's drinking; she told the court that she would periodically leave him, only to return when he would promise to change.<sup>271</sup>

Changes in the law required the court give an instruction *sua sponte* on imperfect self-defense as a lesser included offense when supported by the facts, even when the defense made a strategic choice to focus on a different theory. This allowed certain defendants, otherwise denied the opportunity to present evidence on battering, to challenge their convictions on those grounds through the writ habeas corpus.<sup>272</sup> Thanks to these changes, Walker could argue that self-defense supported by Battered Woman Syndrome evidence would make a difference in her trial, and that she should be granted the opportunity for a new trial.<sup>273</sup> The appellate decision granting her a new trial discusses at length the significance of this type of evidence in such cases, as well as the legislative intent behind it.<sup>274</sup> Ultimately the disposition in this case reflects changes in the law and possibly judicial attitudes toward physical abuse since the 1980s. Walker's story fits into the framework of the cycle of violence,<sup>275</sup> feminine meekness, and the utter brutality of an abuser who would not only assault

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267. *In re Walker*, 147 Cal. App. 4th 533 (2007).

268. *Id.* at 538.

269. *Id.* at 539.

270. *Id.* at 540.

271. *Id.*

272. *Id.* at 550.

273. *Id.* at 552–53.

274. *In re Walker*, 147 Cal. App. 4th at 545–48.

275. Adams, *supra* note 108.

his wife, but point firearms at her—a clear and unmistakable threat to harm her.

Mary Lee Ross' case is a voluntary manslaughter case in which she is serving a lower term of three years, plus an enhancement of three years for using a gun.<sup>276</sup> Ross's husband stabbed her, pointed guns at her, and beat her severely, including punching her, slamming her head against the floor, and swinging a bat at her.<sup>277</sup> He was paranoid, convinced of a "conspiracy" that was out to get him.<sup>278</sup> On previous occasions Ross had been able to deter him from killing her by threatening to shoot herself with the gun he required her to keep by her side of the bed.<sup>279</sup> On this occasion, he accused her for the first time of being a member of the "conspiracy," and accused her of preventing him from being able to get a job.<sup>280</sup> When she attempted to dissuade him from harming her by the usual means, he only told her she'd "make [his] job easier."<sup>281</sup> He told her to get in bed and lay down and said "I'm going to kill you," hit her, and reached for the gun he kept on his side of the bed.<sup>282</sup> She shot him with the gun she had hidden in her pillow when he told her to go to bed.<sup>283</sup>

In both of these cases, not only was the physical violence inflicted on the women is severe, the men in these cases carried guns that they used to menace their wives in confrontations shortly before the killing. Additionally, there was little to no evidence that either woman had acted aggressively, cheated, or otherwise behaved in an "unfeminine" way. Although Walker left her husband, he convinced her to return; she returned and tried to make the marriage work. Both women presented Battered Woman Syndrome evidence, but they also fit into "acceptable" categories of behavior and presented husbands whose brutality was beyond dispute. There is no equivocation about whether a man who brutally beats his wife and points guns at her might be capable of murdering her; the only possible dispute is whether she could have reasonably done anything to escape or stop the violence short of killing.

## VI. DISCUSSION

The cases presented show that a number of case factors vary as convictions become more or less severe. Weapon use may signal intent, but weapons may also be necessary for women to be able to defend themselves against abusive male partners. However, use of weapons most

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276. *People v. Ross*, No. 050100222, 2005 WL 1519108, \*1 (Cal. Ct. App. June 28, 2005).

277. *Id.*

278. *Id.*

279. *Id.* at \*2.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

common among the women in this sample put a woman at higher risk of receiving an enhancement along with her conviction. Significantly, the seriousness of enhancements varies along with seriousness of crimes.

The women in the “Actual Harm” group had enhancements of three and four years—and the higher of the two was granted a new trial. In the next category, more serious, sustained cases had enhancements ranging from one to three years. In the Self-Interest group, the few with indeterminate sentences both received twenty-five years to life in prison as enhancements. One woman in the possible threat group received this enhancement, but significantly, hers was also the only case reversed in that group.

These cases indicate that, to some degree, in spousal murder cases access to Battered Woman Syndrome frames and risk of “evil woman” status vary along with seriousness of crimes. Because race and age data are missing, there is no basis for evaluating the effects these factors have on sentencing or access to potentially mitigating framing.

Future research in this vein could access trial information for a greater depth of knowledge about the facts of cases. Additionally, because plea bargains occur in an overwhelming majority of adjudicated cases, research should be done to investigate the role these factors play in plea bargaining as well.

## VII. CONCLUSION

Women whose stories comport with more traditionally acceptable notions of victimhood are likely to receive more lenient sentences. Women who are routinely physically harmed by their partners and can show a plausible “kill or be killed” scenario will benefit the most at trial. Women who cannot show physical harm but can show the undesirability of their male partners as well as their own attempts to be a good wife and mother, such as Marilyn Hudnall-Johnson, may also be accorded sympathy in court. Emotional abuse, however harmful it may be found by a psychological expert, will not negate malice, though it might supply provocation, as in the case of Patricia Johnson. Women who kill for gain will be accorded severe punishments, particularly if that gain is financial. The most severe cases, such as Mary Ellen Samuels, and the most sympathetic cases, such as Hudie Joyce Walker’s, may comport with traditional notions of contract killing for financial gain and imperfect self-defense, and thus be relatively uncontroversial. However, the cases in the middle are those in which the ability of the defendant to fit with notions of appropriate femininity may be the most significant.

In the context of domestic homicide, women are disproportionately affected by weapons enhancement statutes aimed at discouraging the use of firearms. Due to the typical size difference in heterosexual couples, a woman is less likely to use personal weapons or weapons that otherwise

require use of superior physical force against her partner than she is to have such weapons used against her. To the extent such enhancements have efficacy in discouraging firearm use in other violent felonies, they are not equally applicable to the domestic context where motive for violent offenses may be quite different. Further, the emphasis placed on punishing use of firearms, when viewed in light of the ways that women die at the hands of "unarmed" male assailants, seems to put an undeserved weight on the faster and arguably less horrifying death provided by a gun rather than a beating death.

As previously indicated, this Note is not intended to provide predictive data. Future research in this area should look at cases at the trial level, and would ideally examine a larger sample. Focus on a narrower geographic region would provide more comparable cases by limiting the extent to which differing juror attitudes or social would affect case outcomes. Further, examination of the ways in which male defendants are punished or rewarded for "typical" or "atypical" male behavior in homicide cases could provide deeper insight into whether men are similarly constrained by gender roles.